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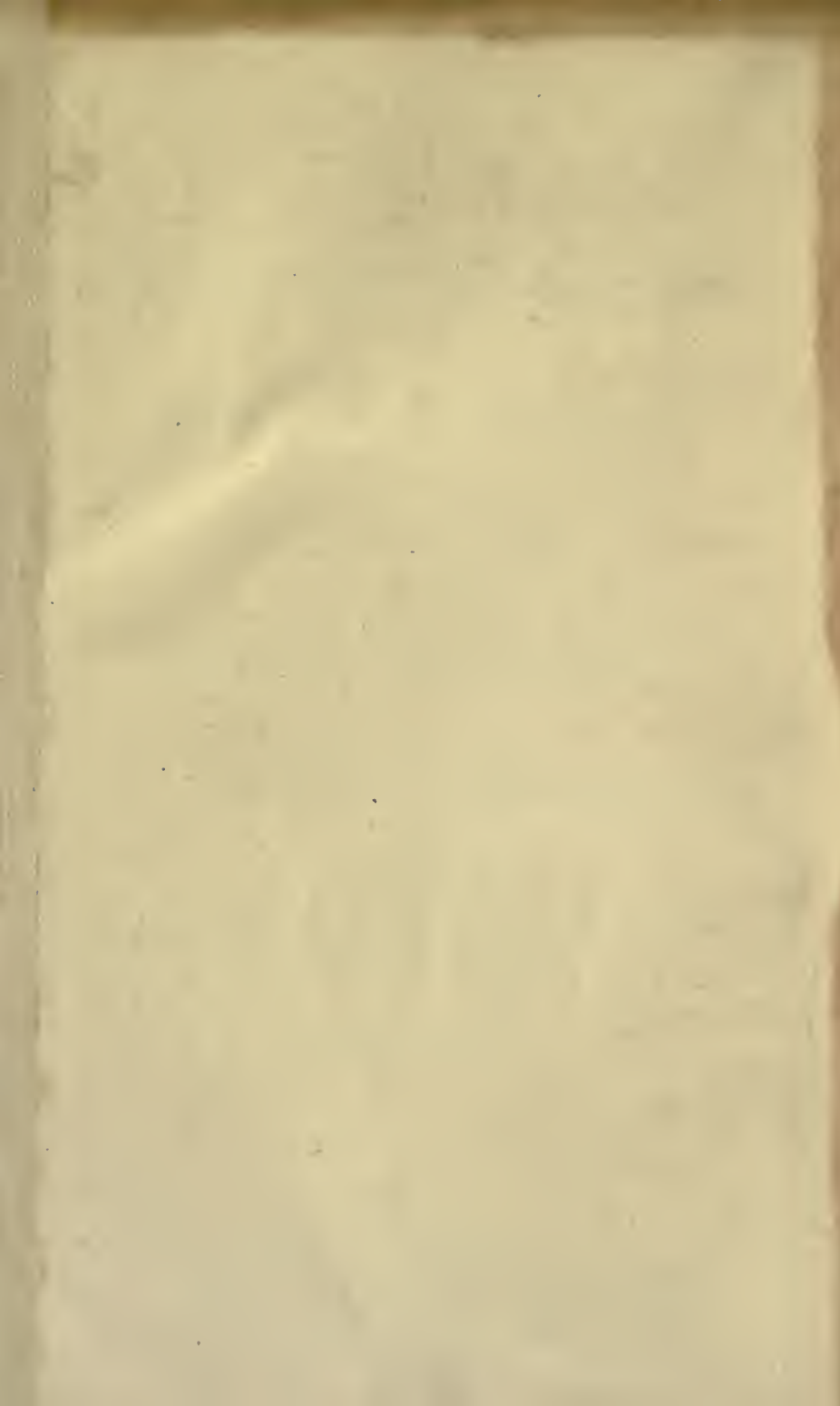


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A GUIDE
TO
EXECUTORS AND ADMINISTRATORS

IN THE SETTLEMENT OF THE
ESTATES OF DECEASED PERSONS
WITHIN THE
STATE OF OHIO

TO WHICH ARE PREFIXED
THE PROVISIONS OF LAW RELATING TO WILLS, WITH NOTES
OF DECISIONS AND PRACTICAL SUGGESTIONS.

BY
GEORGE W. RAFF
AUTHOR OF "PENSION MANUAL," "OHIO ROAD LAWS, ETC." *E. F. Fyle.*

SIXTH EDITION.

REVISED, ENLARGED, AND CONFORMED TO THE REVISED STATUTES
TAKING EFFECT JANUARY 1, 1880.

BY
FLORIEN GIAUQUE
Of the Cincinnati Bar

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PREFACE TO THE FIFTH EDITION.

SINCE the fourth edition of this work was published, there have been issued eleven volumes of decisions of our Supreme Court and Supreme Court Commission, and seven annual volumes of statutes; and all the laws relating to Procedure before Magistrates, in the Probate, Common Pleas, and Superior Courts, and in District Courts on appeal, including the laws relating to Wills, to Executors and Administrators, and other kindred subjects treated of in this volume, have been codified and the acts relating thereto repealed. The questions settled by these decisions, and especially the additions, omissions, and changes in the laws relating to the subjects above mentioned, have made the thorough revision of this volume imperative; and other engagements having prevented its able author, Judge Raff, from undertaking this revision, the publishers put it into the hands of the present revisor. His aim has been to make accurately such changes as were necessary and desirable under the circumstances, and no others; and to do this *thoroughly* and *reliably*, without regard to the time and labor expended. The most important changes made, in addition to conforming the text to the laws as now in force, are: 1st. Complete references from the text to the law on which it is based; 2d. Additional references to decisions; 3d. A greatly enlarged index; and, 4th. Additional forms.

While Judge Raff modestly made no such extensive claim for his work, yet it has been in the past a most useful, convenient, and reliable manual, not for executors and administrators alone, but also for attorneys and other officers of the courts having jurisdiction of its subject-matter. It is hoped that the changes above referred to will not have detracted from it in this respect.

Acknowledgments are due and gratefully made to Senator Stanley Matthews and to Hon. Warner M. Bateman for valuable opinions as to the force and effect of certain changes in the law, and for other assistance, and to Daniel Herider and Emil Hoffman, Esqs., experienced deputies in the offices of the Probate Judge and Clerk of the Courts of Hamilton County, respectively, for practical suggestions.

F. G.

CINCINNATI, 1879.

(iii)

PREFACE TO THE SIXTH EDITION.

SINCE the publication of the fifth edition, there has been some new legislation concerning Executors and Administrators, three additional volumes of Ohio Supreme Court decisions have appeared, the new code of laws has been adopted, with some changes even in those parts of it found in volume 75 Ohio Laws, and made the basis of the fifth edition of this work; and *all* the statutes as found in the annual volumes, previous to January 1, 1880, but now embodied in this code, have been repealed. The references to the laws, as found in former editions, had therefore to be changed, and the text again made to conform to the laws as now in force. Occasion was taken to insert additional notes and cross-references, and to verify the references throughout. Such notes as could not be inserted in the body of the work, have been added as an "Appendix," to which proper references are made.

It is hoped, and it is probable, that the laws are now in such shape that this edition will require no change for many years to come.

F. G.

CINCINNATI, *January*. 1880.

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EXPLANATORY.

THE numbers in large type employed throughout the body of this volume, and enclosed in parentheses, refer to the forms in the closing part, and are inserted for the convenience of the reader in finding the forms adapted to the various subjects treated of. The numbers in small type refer to notes of decisions, and the letters refer to the law on which the matter preceding the letter is based.

For the information of those who are not familiar with legal matters, it may not be improper to remark, that the decisions of the Supreme Court of Ohio are published in two series of Reports, with different names. The number of volumes of Reports at the time the new Constitution went into effect was twenty; these are called the Ohio Reports. Since then, thirty-one additional volumes have been published, and these are termed the Ohio State Reports. The Reports are referred to by the numbers of the several volumes; as, 5 Ohio, 71; 3 Ohio St. 320—that is to say: 5th volume of Ohio Reports, page 71; 3d volume of Ohio State Reports, page 320. References are also made to the Western Law Monthly, as W. L. M.; to Cincinnati Superior Court Reporter, as C. S. C. R.; to Wright's Report, as W.; Western Law Gazette, as W. L. G.; Disney's Reports, as D.; Handy's Reports, as H.

Should the reader desire to examine at large any case cited in the foot-notes of the following pages, he can find the Reports in almost any lawyer's library.

All the laws of Ohio in force have been arranged into a code, adopted by the Legislature in 1879, and its sections are numbered consecutively, without reference to subject-matter, or to chapters, or other subdivisions. It is to these sections that the numbers at the foot of the pages refer.

GUIDE

TO

EXECUTORS AND ADMINISTRATORS.

CHAPTER I.

RELATING TO WILLS.

As the settlement of estates by law, and the disposition of the same by will, are subjects intimately connected, I propose, before proceeding to consider the method prescribed by law for the settlement of estates in general, to notice briefly the several provisions of law relating to wills, and to add such suggestions as may be deemed of advantage to persons interested in the execution, probate, or construction of wills.

SECTION I.

BY WHOM WILLS MAY BE MADE, AND HOW; WITH A FEW PRACTICAL HINTS TO TESTATORS.

The first section of the law relating to procedure in probate courts (Part II., Title II.), provides that, "In this title the term 'will' shall be construed to include codicils as well as wills; every word importing the masculine gender may extend and be applied to females as well as males; every word importing the singular number only may extend to and be applied to several persons or things as well as one; and every word importing the plural number only may extend to and be applied to one person or thing as well as several." ^a

(1) For many important recent notes of decisions as to wills, see pp. 345, et seq.

(a) Rev. Stat., § 5913.

Subject to certain limitations given in this chapter, any person¹ of full age² and of sound mind and memory, and not under any restraint, having any property, personal or real, or any interest³ therein, may give and bequeath the same to any person by last will⁴ and testament lawfully executed.^a

If any testator die leaving issue of his body, or an adopted child, living, or the legal representative of either, and the will of such testator give, devise, or bequeath the estate of such testator, or any part thereof, to any benevolent, religious, educational, or charitable purpose, or to this state or any other state or country, or to any county, city, village, or other corporation or association in this or any other state or country, or to any person in trust for any of such purposes, or municipalities, corporations, or associations, whether such trust appears on the

(1) It seems that previous to June 1, 1808, a married woman could not make a will. But by the law which took effect on that day (Chase, 571), it was held that a married woman could make a will devising real estate held by her in her own right. *Allen et al. v. Little*, 5 Ohio, 65.

By all the acts passed since then, relating to wills, this right has been vested in married women. Chase, 929, 1305, 1785; Swan, 992; S. & C. 1615, §§ 1 and 77; 72 Ohio L. 3; 75 Ohio L. 838; Code of 1879, §§ 5914, 3108.

(2) A male person is "of full age" at twenty-one years of age; a female person at eighteen years of age. Under these ages respectively the law considers them "infants" or minors.^b

(3) A future contingent interest in real estate, in the nature of a contingent remainder or executory devise, is an interest in lands known to the law, and may be transmitted by devise or deed. *Lessee of Thompson v. Thompson et al.*, 6 Ohio St. 480. See note 51, p. 344.

(4) A joint will is unknown to the testamentary law of this state, and is inconsistent with the policy of its legislation. And where a husband and wife, each being the separate owner of property, join in the execution of an instrument in the form of a will, and treating the separate property of each as a joint fund, bequeathed legacies and devised lands to divers persons, the same can not be admitted to probate as the joint will of both parties, nor as the separate will of either. *Walker v. Walker*, 14 Ohio St. 157.

Although some of the provisions contained in the body of such a will may be, in form and effect, several, yet, inasmuch as the provisions of such a will partake of the nature of a compact, in which such provision is influenced by all the rest, all the provisions of the will must stand or fall together. *Ib.*

(a) § 5914.

(b) § 3136.

face of the instrument making such gift, devise, or bequest or not, such will as to such gift, devise, or bequest, shall be invalid, unless such will shall have been executed according to law, at least one year prior to the decease of such testator.^a

Every last will and testament (except nuncupative wills hereinafter provided for¹) shall be in writing, and signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge the same.^b

Every codicil must be executed, attested, and subscribed in the same manner, as the law specially provides that all its provisions, relative to wills, apply to codicils also.^c

It is not sufficient that the will or codicil upon its face purports to have been made by the testator, even though it should be written by him; but it is in all cases indispensable that his signature should appear at the end of such will or codicil, and that the signing be attested by two or more competent persons who saw him subscribe his name, or heard him acknowledge that he did so.²

The witnesses must subscribe their names, as such, in pres-

(1) See page 43.

(2) Such acknowledgment need not be in express words, but may be inferred from signs, motions, conduct, or attending circumstances. *Raubaugh et ux. v. Shelley et al.*, 6 Ohio St. 307. In *Lessee of Reynolds and wife v. Shirley*, 7 Ohio (pt. 2), 39, it was held that where a testator, in the presence of two witnesses, held up a will, executed in 1824, and requested them to sign a certificate of such acknowledgment, which they did, it was a valid will, without the signature of the testator to such reacknowledgment.

Where a decedent in his lifetime drew a will, and signed it, but without having it witnessed, and afterward added thereto a clause making an additional devise of the property mentioned in the will, and then caused it to be subscribed by two witnesses, but without again signing the same himself "at the end thereof," as required by the second section of the "act relating to wills:" *Held*, that the whole instrument was invalid as a last will and testament. *Glancey et al. v. Glancey et al.*, 17 Ohio St. 134.

(a) § 5915.

(b) § 5916.

(c) §§ 5918, 5953.

ence of the testator; but they are not required to sign in the presence of each other, nor at the same time.¹

If money or other property be bequeathed or devised to a charity, especial care should be taken to express clearly the object of the donation, and to designate with certainty the person, class of persons, society, institution, or public enterprise intended to be benefited thereby. A devise to any person in trust for the poor should point out specifically the class of persons to whom the appellation is intended to apply; and the trust should be defined with sufficient certainty to enable a trustee to execute the same in all respects according to the desire and intent of the testator.² In such cases the testator may, by investing his trustee with large discretionary powers, guard against the danger of lapse for uncertainty in defining the trust, and also provide for unthought-of contingencies which may arise during the existence of the trust.³

A testator can not, by any expedient to which he may resort in his will, release his property, either real or personal, from liability for the payment of his debts after his death.⁴ Nor can

(1) *Raudebaugh v. Shelley*, 6 Ohio St. 307. See notes 99-101, p. 352.

(2) A gift to a charitable use is to receive the most liberal construction. *Zanesville Canal and Man'fg Co. v. City of Zanesville*, 20 Ohio, 483.

(3) A testator provided by his will that certain property should be retained by his executor, and invested by him during the life of testator's wife for her use, and that at her death it should be devoted to the advancement of the Christian religion, in such manner as, in executor's best judgment, would best promote that object. During the life of said executor and that of said widow, the heir brought suit to annul the will for uncertainty as to that object. *Held*, that the testator had conferred ample power upon executor during life of wife, at least, and that during that time the courts would not interpose to prevent its exercise by the executor. *Miller v. Teachout*, 24 Ohio St. 425. See note 75, p. 348.

(4) The debts of a deceased person are a lien upon the land of which he died seized, in default of personal assets, whether devised or cast by descent. This lien, it is said, can only be removed by the payment of the debts, or the lapse of time. *Ramsdall v. Craighill et al.*, 9 Ohio, 197. But where land is bequeathed to a wife for life, with power to devise the same to whom she pleases, and she accordingly devises it, after her death her devisee takes the estate disincumbered by her debts. *Donley's Adm'rs v. Donley's Guardian*, 14 Ohio, 359.

A purchaser from an administrator, under an order of sale, holds the

the heirs or devisees of a testator, by making sale of his real estate after his death, and before his creditors take steps to subject the same to the payment of their claims, divest such real estate of the liens of such creditors; but the same will remain charged with the payment of the debts of the testator even in the hands of an innocent purchaser.^{1 a}

But when the personal estate of a testator is insufficient to satisfy his debts, and he leaves real estate which is undivided, this must first be sold and appropriated to the liquidation of such debts before that which is devised can be subjected to sale for that purpose. If the will provides for the payment of the

land discharged of the liens for debts. *Bank of Muskingum v. Carpenter's Adm'rs*, 7 Ohio (pt. 1), 21; *Stiver's Adm'r v. Stiver's Heirs et al.*, 8 Ohio, 217.

(1) The heirs and devisees of the ancestor hold the land subject to his debts. *Ramsdall v. Craighill et al.*, 9 Ohio, 197; *Stiver's Adm'r v. Stiver et al.*, 8 Ohio, 217.

A purchaser from the heirs is bound to take notice of the rights of the creditors of the ancestor, and takes the incumbrance of the ancestor's debts with the title. No circuitry of conveyance, no collusion or management among the holders of the estate, will free the land from the burden of the debts of the ancestor. *Piatt v. St. Clair's Heirs et al.*, 6 Ohio, 227; *Stiver's Adm'rs v. Stiver et al.*, 8 Ohio, 217.

The sale of land by an heir is good to convey the title, but the purchaser takes the land charged with the debts of the ancestor. *Piatt v. St. Clair's Heirs et al.*, 6 Ohio, 227.

See also *McDonald et al. v. Aten et al.*, 1 Ohio St. 293, and *Farran's Adm'r v. Robinson*, 17 Ohio St. 242.

An heir can not, by bidding in the land, upon sale for taxes, divest the creditors of the ancestor of their lien upon it. *Piatt v. St. Clair's Heirs et al.*, 6 Ohio, 227.

Where several tracts of land have descended to the heirs, and some have been sold and conveyed by them, and some have not, a court of chancery will so far control a creditor of the ancestor in asserting his lien in chancery as to require him to resort first to land remaining unsold, and if that be not sufficient to liquidate the debt, resort must be had to the unsold lands, in regular order, beginning with that last sold. *Ib.*

Creditors must first exhaust their remedy against the personal representative, before they can have recourse to lands in the hands of purchasers from the heirs. *Stiver's Adm'rs v. Stiver et al.*, 8 Ohio, 217. See also note 3, p. 131, and note 1, p. 153.

debts in any other manner, the terms of the will, so far as they do not contravene the rights of creditors, will be observed and followed.^a

For various provisions of law relating to undevise real estate, to contribution by legatees when the property devised to one of them is taken to pay debts, and other kindred matters, see Chapter XI of this volume.

The law prohibits any person from disposing by will of any estate in fee simple, fee tail, or any less estate, to any person except such as are in being, or to the immediate descendants of such as are in being, at the time of making the will. Therefore, if a man have children living, he can not legally devise his real estate to them for life, and after *their* death to *their* children for life, and so on indefinitely; but in such case, upon the death of the children of the testator, *their* children will take an absolute estate in fee simple.^{1b}

(1) Although not in all respects technically correct, this is believed to be near enough so to answer the purpose of an illustration. Where a testator gives property to two daughters and two grandsons for life, and then provides that the portion in which each of them enjoyed a life estate, shall "descend and pass absolutely unconditionally, and in fee simple, respectively to the children of each, lawfully begotten of the body of each, *or to the children or child* lawfully begotten of the body of such child or children:" *Held*, 1. That the words "*or to the children or child* lawfully begotten of the body of such child or children," were intended to designate persons who might be living at the death of the tenants for life, and not as words of limitation, requiring a succession first to children, and then to children of the children. 2. That the words did not render the devise over, after the determination of the life estate, void for uncertainty, or repugnancy, but that the meaning of the testator was, that upon the death of the tenant for life the children then living were to take, and if any child of the tenant for life had predeceased, leaving a child or children, such child or children should be substituted to the place of the deceased parent. *Stevenson v. Evans et al.*, 10 Ohio St. 307.

Where in a will there is a devise for life, and then to the children of the tenant for life in fee simple, and then a limitation over, if such tenant for life "should die without having any heirs lawfully begotten of their or either of their bodies: *Held*, that the latter words are to be construed with reference to the former, and that the heirs of the body intended by the tes-

(a) § 5972.

(b) § 4200.

A will to be effectual in passing both real and personal estate, must be in writing; a verbal will is valid so far as relates to personal property only.^a

A man can not by will bar his wife of her right of dower^b in his real estate, if she prefer to take such dower instead of the portionator, are the children of the tenant for life designated in the prior limitation. *Ib.*

H., by his will executed in 1809, devised certain real estate in Ohio to F., an unmarried daughter, for life, and the remainder at her death to her child or children then living, and the descendants of those who might be dead, equally, *per stirpes*. F. subsequently married, had thirteen children born, but at her decease left only ten children then living, one having previously died without issue, and two having issue. *Held*, that the devise to the children of predeceased children is not in conflict with the statute "to restrict the entailment of real estate," passed February 17, 1811; and that the "immediate descendants," to which, by said act, all devises are restricted, includes all to whom, under the statute of descents, an estate would have descended immediately from the particular person whose descendants they by the will are required to be. *Turley v. Turley et al.*, 11 Ohio St. 173.

A testator devised certain real estate to his granddaughter S. and her issue—*habendum*, to S. "and her issue and their heirs." If S. should die before the age of twenty-one years, leaving no issue then living, there was a devise over to two daughters of the testator for their lives, and, upon their decease, to their issue respectively. S. had no issue, but died after she became twenty-one years of age. *Held*, 1. That issue, as used in connection with the devise to S., was a word of limitation, and not of purchase, and that S. took an estate in fee tail. 2. That although S. died without issue, yet as her death did not occur till after she became twenty-one years of age, the devise over to the daughters never took effect. *Harkness v. Corning*, 24 Ohio St. 416.

The statute to restrict the entailment of real estate does not change the nature of an estate in the first donee in tail from an inheritable estate to an estate for life merely. The object of the statute is to restrict the entailment to the immediate issue of such donee, and, on the determination of his interest in the estate, and of such rights as the law annexed to it while held by him, to enlarge the estate tail in the hands of such issue into an absolute estate in fee simple. *Ib.*

One of the incidents of an estate in fee tail, at common law, is the right of the surviving husband to an estate by curtesy, with which the statute above referred to does not interfere, and to which, in this state, the husband is entitled, whether there be issue born during the coverture or not. *Ib.* See also notes 1, p. 10, and 4, p. 13.

(a) §§ 5916, 5991. See pp. 2, 3, and 43, this volume.

(b) §§ 4188-4194.

vision made for her in the will; nor can a married woman by will make such disposition of her real estate as will defeat her husband's right of curtesy.^{1a} When it is the intention of the testator that the provision made for his widow shall be in lieu of dower, the fact should be distinctly stated in the will, to avoid cavil.²

Any father, or in case the father be dead or have gone to parts unknown, any mother may, by last will in writing, appoint a guardian or guardians for any of his or her children, whether such children be born at the time of making the will or afterward, to continue during the minority of the child, or for a less time.^b But no person who has been or shall be admin-

(1) Where a will assumes to give to one of its beneficiaries property of another person (that property being the husband's life estate in his wife's land, by curtesy, and that person being that husband), for whom provision is also made in the will, the latter (the husband) can not take the provision made for him in the will, and also hold the property, but must elect which he will take. *Huston v. Cone*, 24 Ohio St. 11.

In order to put the party to such election, it must *plainly* appear that it was not the intention of the testator to give him the provision made in the will in addition to the property, except when the property in question is the widow's right of dower, as to which the rule has been reversed by statutory provision. 1b.

A court of equity has jurisdiction to compel the party to make such election, or to abide by an election already made. 1b.

Such election, in order to make it binding upon the party, must be made understandingly—that is, with a knowledge of the facts and of the parties' rights under the will. 1b. See notes 3, 4, p. 337.

(2) A testator, by clear and express language in the former clause of his will, having divided all his property, real and personal, between his widow and his two children, giving to the widow and her heirs forever one-third of his real estate and more than one-third of his personal estate, the sum appearing to be more than sufficient for her life support, and giving the rest of his estate, real and personal, in equal portions, to his said children and heirs: *Held*, 1. That a subsequent declaration of the testator, in the concluding clauses of the will, that said bequests and devises were not intended to be and were not in lieu of dower in either his real or personal estate, does not operate to control or change the express bequests and devises so before stated in the will. 2. That the widow, having elected to take un-

(a) § 4176.

(b) § 6266.

istrator of an estate or executor of a last will, in which estate or by which will any minor has or shall have any interest, shall be appointed guardian of the *person and estate*, or of the *estate only*, of such minor. Such person may, however, be appointed guardian of the *person only* of such minor.^a

A married woman can not, except as provided above, appoint a testamentary guardian for her child or children.

If a will direct that no bond shall be required of any executor, trustee, or guardian named therein, or that no inventory or sale of the testator's property shall be made, the probate court may observe the wishes of the testator in any of these respects, or may, for what may be deemed sufficient cause, require that such executor, trustee, or guardian shall conform to the law, and that the administration of the testator's estate shall take the usual course.^b

Any real or personal estate, or any interest therein, acquired by a testator subsequent to the execution of his will, will pass thereby, in like manner as if previously owned by him, in case it clearly appear by the terms of the will that such was his intention.^{1 c}

When lands and tenements are devised to any person, he or

der the will, and the personal property not being intestate, she is not entitled to a distributive share of the personal property under the statute *Parker et al. v. Parker's Adm'r et al.*, 13 Ohio St. 95.

Foreign as well as domestic wills disposing of lands in this state are governed by the laws of Ohio in their construction, and are to be construed in accordance with the law prescribing that if a provision be made for a widow in the will of her husband, she shall not be entitled to such provision and also to dower, unless it plainly appears by the will to have been the intention that she should have such provision in addition to her dower. *Jennings v. Jennings*, 21 Ohio St. 56. See also the second paragraph of the preceding note, and notes 35-38, p. 342.

(1) A testator can not, by any words of exclusion used in his will, disinherit one of his lawful heirs, in respect to property not disposed of by his will. Such words can not be used to control the course of descent, so as to carry the property to his other heirs. They can not be used to raise an estate by implication in favor of his other heirs; there being no attempt in the

(a) § 6255.

(c) § 5969.

(b) §§ 5996, 6268, 5981, 6304.

she takes all the interest of the testator therein, or so much thereof as he could lawfully devise, unless it appear that the intention of the testator was to grant a less estate.^{1a} No words of perpetuity (as "to him and his heirs," or, "to him, his heirs and assigns, forever") are necessary in a will to pass an es-

will to dispose of the property or to create any interest therein. *Crane v. Doty*, 1 Ohio St. 279. See also *Lessee of Smith et al. v. Jones*, 4 Ohio, 115.

(1) A testator, after giving, by his will, to his eldest son, Matthew, twenty-five acres of land from off the farm on which he lived, uses the following language: "Item Third. I give and bequeath to my youngest daughter, Margaret Harper, the remaining part of my real property." "Item Fourth. . . . Should my youngest daughter, Margaret Harper, die without any legitimate heirs, her part of my real estate shall fall to my eldest son, Matthew Harper." *Held*, 1. That the language of "item third" is sufficient, standing alone, to vest in Margaret a fee simple estate, and in its effect upon subsequent provisions of the will, is to be considered the same as if he had devised the residue of his estate to Margaret, her heirs and assigns forever. 2. That the words "legitimate heirs," mean "*legitimate issue*," and the whole clause, "should my youngest daughter, Margaret Harper, die without any legitimate heirs," refers to a definite, and not an indefinite failure of issue, and are to be construed as if the words *living at the time* of her death, had been added after the words "legitimate heirs." 3. That under items third and fourth, taken together, Margaret took an estate in fee simple, subject, however, to be determined by the contingency of her dying without issue living at the time of her death, on the happening of which, the estate would pass over to Matthew, by way of executory devise. *Niles et al. v. Gray et al.*, 12 Ohio St. 320. See also *Parish v. Ferris*, 6 Ohio St. 563; *Ward v. Barrows*, 2 Ohio St. 241; *Shaw et al. v. Hoard et al.*, 18 Ohio St. 227; *Decker's Ex'rs v. Decker's Ex'rs*, 3 Ohio, 157.

Subject to payment of his debts, etc., a testator left to his wife all his property during her life, . . . and declared it to be his will that she should have the entire management of his estate, and that she might dispose of it in whatever way she might "think best for herself and heirs;" and provided that, at her death, whatever might be left of his estate, after payment of her legacies and debts, should be equally divided among his children. *Held*, that the will did not give her an absolute right to the personality, nor a fee simple to the realty, but only a life estate and life support, with power to manage and dispose of the property in any manner that, in her judgment, would best promote her own welfare and benefit the estate; but she was *not* authorized to give the property to a *part only* of the chil-

tate of inheritance; but if the language used be general, and comprehend the whole property, or the testator's interest therein

dren, for the purpose of defeating testator's intention that *all* his children should share equally in the distribution of his estate. *Huston v. Craighead*, 23 Ohio St. 198.

A testatrix devised a house and lot to her husband for life, on condition that he provide, in a suitable manner, for their imbecile daughter, L., during their joint lives, with power to sell the premises in fee simple, if, in his judgment, such sale became necessary for the comfortable support of either himself or L. She also devised same premises to their son A., in fee simple, in case the father died before L., leaving the premises unsold, on the same conditions as to the support of L. as above. The father died before L., not having sold the property, and A. took the property and suitably supported L., till his death in 1857. But, in the meantime (in 1852), A. sold the property, by general warranty deed, to W., who, with his assigns, has held the property ever since. *Held*, that the estate of W., and of his assigns, is absolute, and can not be charged with maintenance of L. *Huey v. Thomas*, 25 Ohio St. 645.

Where a testator made a devise to his son, John, "through his natural life, and then to his heirs," and, in another part of the will, used the word "heirs" in the sense of children: *Held*, that the son took a life estate only, with remainder to his children, or issue, and not to his children generally; that at his death without issue, the remainder failed, and the estate reverted to testator's heirs. *Bunnell v. Evans*, 26 Ohio St. 409.

G. devised to his daughter, H., certain real estate for her life, remainder to her children, and remainder over to her brothers and sisters, in the event she should die without issue surviving her, with like remainder over if she should die leaving issue, and such issue should die under the age of twenty-one years without issue. H. still survives at the age of sixty, and has children living, each of whom is over twenty-one years of age, but none of them has issue. *Held*, the effect of the devise over to the brothers and sisters of H. in the event of her death without surviving issue, was to make the devise to the children of H. contingent upon her death leaving issue surviving her. The subsequent devise over, in the event that H. should die leaving issue, and such issue should die under the age of twenty-one years without issue, did not discharge the devise to the children of H. from the contingency of her death without surviving issue. Therefore a deed of conveyance by H. and her children would not pass an absolute estate in fee simple to the grantee. *Bates v. Zinsmeister*, 26 Ohio St. 461.

A testator bequeathed to his wife (who was his only heir-at-law, and whom he appointed as one of his two executors), "*in trust only*, and during her natural life only," the rents of certain real estate, the dividends on his bank stock, and the interest on debts due him, "as long as she" might "live," with a proviso that the bank stock and debts should not be diminished, but with-

(as, "I give and devise to my son, A., one-third of all my land

out any such proviso as to the rents, dividends, or interest. He then directed that after the death of his wife "all his estate, real, personal, and mixed (except certain named tracts of land, which had been specifically devised) should be equally divided between the children of his nephew, but that no such division should be made till the youngest child became of age. The will did not otherwise appoint or name any beneficiary of the trust fund or give any directions as to its management by the wife, or make any provision for its management after her death, in case she should die before the majority of the youngest child. The will provided that, in case of the death, resignation, or refusal of either of the executors, the other should act as sole executor. *Held*, that the words "in trust only," in their ordinary technical sense, are repugnant to the general scope and tenor of the will, and are without legal effect in its construction, and that the wife took an absolute property in the rents, dividends, and interest so bequeathed to her. *Davis v. Boggs*, 20 Ohio St. 550.

A testator had originally five brothers and sisters, one of whom had died thirty years before the date of the will, leaving children who were still in full life. The other four were living, and three of them had children also living at the date of the will, which was made a day or two before the death of the testator, and with full knowledge of these facts. The testator left a widow surviving him, but no children. By his will he directed that a certain farm should be rented and managed by his executors till his debts should be fully paid; after which he gave and devised to his wife the use of the farm during her natural life. Then follows this item: "Fifth. I devise that my executors, or the survivors of them, after the decease of my said wife, shall sell said last mentioned farm, either at public or private sale, and that the proceeds thereof be divided equally between my brothers and sisters and their heirs--the children of any that may be dead to have the shares of their deceased parents." *Held*, that the fifth item of the will is to be understood as a direction that after the death of testator's wife the farm should be sold and the proceeds of sale be divided equally between such of his brothers and sisters as might then be living, and the issue or lineal descendants of such brothers and sisters as might then be dead; such issue to take *per stirpes* and not *per capita*. *Riehey v. Johnson*, 30 Ohio St. 288.

The gift implied in the direction to divide the proceeds between the designated parties is a gift of personalty; but as the fund could not be raised till the death of the widow, and was to be divided between the persons then living, the interest of the legatees therein remained contingent till that time. *Ib.* 288.

The word "heirs" in this item was not used in a technical sense. The testator did not intend that the share of any presumptive legatee dying before the widow should be paid to his or her administrator or other personal representative, but that the children of any deceased parent, who, if living

that I now have in my possession,"¹ or, "all my interest," "all I am worth," "all my right," "all my title")² and no words of limitation be used by which the estate is qualified, a fee simple will pass.³

But it is expressly provided by law that when real estate is devised to one for life, and after his death to his heirs in fee simple, or if words to that effect be used by the testator, the first devisee takes a life estate only; and the absolute estate vests in his heirs after his death.^{4a} This annuls the celebrated

at the death of the widow, would have been a legatee, should have the share of such deceased parent. *Ib.* 288.

See also notes under "Wills," appendix, p. 345 et seq.; notes on pp. 13, 14, 15, 16.

(1) *Smith et al. v. Berry et al.*, 8 Ohio, 365.

(2) *Ibid.* See also *Lessees of Thompson v. Thompson et al.*, 6 Ohio St. 480; *King et al. v. King's Adm'r*, 15 Ohio, 559; *Howe v. Fuller et al.*, 19 Ohio, 51; *Bane et al. v. Wick et al.*, 19 Ohio, 328.

(3) Where words in a will would convey a fee, yet they may be restricted and held to convey a less estate, when it is apparent, from other portions of the will, that such was the real intention of the testator (*Howe v. Fuller et al.*, 19 Ohio, 51), if the language of the testator, in the residuary clause of his will, will admit of a limited application, as well as of a more general character, a court of equity will give it that construction which will be most favorable to the heir at law. *Bane v. Wick*, 19 Ohio, 328. See notes 61, 63, 82, 84-87, pp. 346-350.

(4) A father, by his last will, devised his real estate as follows: "After my debts, etc., have all been paid, I give and bequeath all the rest and residue of my property to my beloved wife, Joanna Jeffers, during her natural life, including my real, personal, and mixed property, of every kind whatsoever. After the decease of my wife, I give and bequeath all my property, real, personal, or mixed, of every kind, to my two sons, William and Henry Jeffers, to them and their heirs and assigns forever. It is my will that if either of my said sons, William or Henry, shall happen to die before my beloved wife, Joanna, then it is my desire that the survivor, at her decease, shall have the whole of her property, to him and his heirs and assigns forever." *Held*, that during the life of Joanna, the contingent interest of William was, in law, releasable to Henry, and passed by such release. *Jeffers v. Lampson*, 10 Ohio St. 101.

Where a testator devises to his "daughter E., during her natural life, and to her children after her death forever," one-eighth part of his real estate, and there is no provision in the will in respect to a disposition of the remainder, in case E. shall die without having had issue, and there is nothing in the

"rule in Shelley's case,"¹ and renders it inoperative in this state.

A will is not invalidated by the failure of the testator to make *some* provision therein for all his children who are living at the time of its execution. If a testator be legally competent to make a will, and be free from restraint, he may omit the names of any or all his children, without affecting its validity. Therefore, if the testator, on account of advancements made to any of his children, or for any other cause, should desire to preclude them from claiming any portion of his estate after his death, it is only necessary that their names be entirely omitted from the will, or that they be so mentioned as to show the intention of the testator to be to bar them from any participation in the further distribution of his estate. Such omission will not prevent them from inheriting equally with the other children of the testator, any estate not devised by the will.²

will showing a contrary intention on the part of the testator, E. takes a life estate only; although, on the death of E. without having had issue, the testator will have died intestate as to the contingent reversion of her share, and the same will revert to his heirs general. *Gilpin et ux. v. Williams et al.*, 17 Ohio St. 396. See also notes referred to on preceding pages.

(1) It is a mistake to suppose that the effect of the "rule in Shelley's case" ever was to convert a fee tail into a fee simple. *Pollock v. Speidel*, 27 Ohio St. 86, 95.

The 47th section of wills act of 1840, and the corresponding 53d section of our present wills act (re-enacted in 1879), were intended to forbid the application of the rule in Shelley's case where such application would defeat the manifest intention of the testator. *Carter v. Reddish*, 32 Ohio St.

The "rule in Shelley's case" is expressed as follows in *Bouvier's Law Dictionary*, Vol. 11, p. 521: "In any instrument if a freehold be limited to (a person) for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee tail; if to his heirs, a fee simple."

(2) See note 1, page 9. A condition in a will whereby the testator excludes any one of his heirs who "goes to law to break his will" from any part or share of his estate, is valid and binding; and effect will be given to it, as well in respect to bequests of personalty as to devises of real estate. A legacy so forfeited will pass to the general residuary legatees named in the will, without express words to that effect in the will. *Bradford v. Bradford's Ex'r et al.*, 19 Ohio St. 546.

When a devise of real or personal estate is made to a child or other relative of the testator, and the devisee be dead at the time of making the will, or die thereafter, leaving children, who survive the testator, such children take the estate devised in like manner as the parent might do were he or she still living; or if the devisee leave no issue, and the devise be of a residuary estate to him or her, and other child or relative of the testator, the estate devised will pass to and vest in such residuary devisee surviving the testator, unless the will otherwise provide.^{1a} But in case the devisee be not a child or other relative of the testator, and he or she die before the testator, the devise, bequest, or legacy will lapse; and upon the death of the testator, the property devised will descend to his heirs, unless the will make some other provision for such contingency.

If lands are devised to a child of the testator, or to any other person, with a provision in the will that the devisee shall pay certain legacies to the heirs of the testator, or to other persons named, and it is intended that the payment of such legacies shall constitute a charge upon the lands devised, it should be distinctly so stated in the will. A want of attention in this respect has not infrequently caused great mischief.²

The testator should also be careful to make known his will relative to any advancements made or to be made to his heirs;

(1) Where a testator gave all his estate to his wife for life, and directed that all remaining after her death should be divided, by his executors, equally among his children, or the *survivors of them*, and, after his decease, one of the children died, before the death of the testator's widow, leaving a child: *Held*, that no interest vested in the deceased child under the will, and that the grandchild of the testator was not entitled to share in the estate, as one of the "children" or "survivors," to whom it was to be distributed. *Sinton v. Boyd*, 19 Ohio St. 30.

(2) Where a testator devised all his real estate to one of his sons, subject to the payment of his debts and the support of his widow, and directed him to pay a specific sum to each of his other children, and the son accepted the devise and took possession of the property, and afterward sold it to one having notice that the legacies were not paid: *Held*, that the legacies were a subsisting charge upon the property, and though the devisee had the right to sell the estate, yet the purchaser was bound to see to the application of

whether they shall be required to account for the same in the distribution of his estate; whether the provision made for them in the will is to be in addition to such advancements; whether their indebtedness to him, if they be indebted, shall be treated as so much money or property advanced to them, respectively, or whether the amount due from each shall be collected by the executor of the will as from other debtors.¹

Should a testator, at any time after executing his will, desire to alter the same, he may do so by appending thereto a codicil. Such portions of the will as are not expressly or by implication revoked by the terms of the codicil, will remain effectual.²

the purchase-money. Express words are not necessary to charge pecuniary legacies upon the real estate. An intention to do so may be derived by implication. *Clyde v. Simpson et al.*, 4 Ohio St. 445.

Where a testator bequeathed his real estate to his son, by the son paying the valuation of \$2,000 equally to the testator's six children, the payment of that sum in the manner specified became a charge upon the land devised, and could be enforced even as against subsequent purchasers without notice of the inembrance. *Nellons et al v. Traux et al.*, 6 Ohio St. 97.

See also *Decker's Ex'rs v. Decker*, 3 Ohio, 157.

Also the following cases, in which sundry questions connected with the subject-matter of the text have been decided: *Coonrod v. Coonrod et al.*, 6 Ohio, 114; *Thompson v. Thompson*, 4 Ohio St. 333; *Tope v. Tope*, 18 Ohio, 520.

A testator, in his will, first devised the farm on which he resided to his wife, for life, and bequeathed to her all the personal property thereon at his death, for the same period, of which he directed enough be sold by her to pay his debts. He next devised the farm, after the death of his wife, to his son Philip, and bequeathed to him all the personalty that might then remain unexpended. He then gave to his son Frederick a legacy of \$100, to be paid to him when he became of age, but did not direct by whom, or out of what fund, it should be paid. When he became of age, the personal property was expended, and the legacy was not paid. *Held*, that the real estate so devised could not be charged with the payment of this legacy. *Geiger v. Worth*, 17 Ohio St. 564. See note 54, p. 345.

(1) See pp. 173 and 174, and notes 55-58, pp. 345, 346.

(2) A will and codicil are to be taken and construed together, as parts of one and the same instrument, and the intent of the testator gathered from the whole. *Collier v. Collier's Ex'rs*, 3 Ohio St. 369; *Negley v. Gard*, 20 Ohio, 310.

A codicil will not be held to revoke the dispositions of a will, further than

(1) §§ 5913, 5914, 5953-5958, 5960.

How a codicil must be executed has been specified on page 3.

Where the alterations desired to be made are material, or numerous, the better practice is to execute a new will.

Although a few general hints have thus been furnished for the guidance of those who may desire to write their own wills, yet such persons will best subserve the interests of those whom they desire to benefit, by employing competent and experienced attorneys to attend to the business for them. Nearly all the litigation growing out of the disposition of estates by will is the direct result of the ignorance and incompetency of those by whom wills are written. It by no means follows that because a man is a good penman, or is a good justice of the peace, and capable of correctly filling up the blank forms of deeds and mortgages that he can write a good will, and one that will stand the test of judicial scrutiny.¹

SECTION II.

THE DEPOSIT, REVOCATION, AND CONSTRUCTION OF WILLS.

DEPOSIT.

After the execution of a will it may remain in the possession of the testator, or may be by him delivered into the hands of some other person, for safe-keeping; or it may be deposited, by the person making the same, or by some person for him, in the

is clearly expressed or necessarily to be inferred from it. *Collier v. Collier's Ex'rs*, 3 Ohio St. 369.

(1) The following decisions, in addition to many of those quoted on the preceding pages, furnish reasons for the suggestions contained in the text:

In construing a will grammatical accuracy is not to be observed, and it should be read with a view to the situation and circumstances of the testator, in reference to the subjects of his disposition and the objects of his bounty. With these collateral aids to a correct interpretation, *the will must speak for itself*, and the intention of the testator be gathered from *what appears* on its face. To allow its language to be varied or contradicted, or omissions supplied, or apparent ambiguities to be removed by parol evidence, would, in effect, repeal the law requiring it to be in writing, and introduce all the un-

office of the judge of the probate court, in the county in which such testator lives, to be safely kept until delivered or disposed of as directed below; and the probate judge, on being paid the fee of one dollar therefor, must receive and keep such will, and give a certificate of deposit therefor; and no will can be admitted to probate without notice to the widow or husband and next of kin of the testator, resident in the state, in such manner and for such time as the probate court shall direct or approve.^a

Every will intended to be so deposited in court must be inclosed in a sealed wrapper, which shall have indorsed thereon the name of the testator, and the said probate judge must indorse thereon, the day when, and the person by whom, it was delivered; and the wrapper may also have indorsed the name of any person to whom it is to be delivered after the death of the testator; and it shall not be opened or read until delivered to a person entitled to receive the same, or otherwise disposed of as provided below.^b

Such will shall, during the lifetime of the testator, be delivered only to himself, or to some person authorized by him, by an order in writing, duly proved by the oath of a subscribing witness; and, after his death, it must be delivered to the person named in the indorsement on the wrapper of the will, if there be any person so named who shall demand it.^c

If no such person shall demand the will, it must be publicly opened in the probate court, within two months after notice of

certainty, fraud, and perjury the statute was designed to prevent. *Worman v. Teagarden*, 2 Ohio St. 380.

Parol evidence can not be admitted to alter, contradict, or control the words of a will. *Painter v. Painter*, 18 Ohio, 247. Wills are to be construed from the written language of the instrument, and not by extrinsic evidence. *Collins v. Hope*, 20 Ohio, 492.

A testator has the perfect right to choose his own language, but not to create an estate which the law does not permit. *Per Read, J., King v. Beck*, 15 Ohio, 559.

In the construction of a will, the sole purpose of the court should be to

(a) § 5917.

(b) § 5918.

(c) § 5919.

the death of the testator, and must be retained in the office of the probate judge, until offered for probate; or if the jurisdiction belongs to any other court, it must be delivered to the executor or other person entitled to the custody of it, to be presented for probate in such other court; if the jurisdiction of such will belongs to the probate judge opening the same, he must immediately give notice to the executor or executors, if any are named in such will, and if none are named therein, then to other persons immediately interested, of the existence of such will.^a

REVOCATION.

A will shall be revoked by the testator tearing, canceling, obliterating, or destroying the same—with the intention of revoking it—by the testator himself, or by some person in his presence, or by his direction;¹ or by some other will or codicil, in

ascertain and carry out the intention of the testator. Such intention must be ascertained from the words contained in the will. These words, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appear from the context that they were used by the testator in some secondary sense. *Townsend v. Townsend*, 25 Ohio St. 477.

All parts of the will must be construed together, and effect, if possible, given to every word in it. *Ib.*

If a dispute arises as to the identity of any person or thing named in the will, extrinsic facts may be resorted to, in so far as they can be made auxiliary to the right interpretation of the testator's words, but for no other purpose. *Ib.*

A man owned one farm on which he lived and which he worked, and another adjoining it, which tenants worked, and which farms he called respectively the "Home Farm" and the "Jo. Boyd Farm," but for several years preceding his death an agent had worked them both together without reference to division line. He (the owner) devised the "Home Farm" to his wife. Did he mean the original "Home Farm," or both united? Parol evidence was admitted to show that he still designated them as above when he made his will, and the jury were properly instructed that they must determine what he meant. *Boggs v. Taylor*, 26 Ohio St. 604.

See also p. 10, note 1, fifth paragraph especially; note 3, p. 155; *B'd Ed. v. Ladd*, 26 Ohio St. 210; notes 54 et seq., p. 345.

(1) A testator being blind, told J. to bring him his will, and J. handed it

(a) § 5920.

writing, executed as heretofore prescribed; or by some other writing, signed, attested, and subscribed, in the same manner, but nothing herein contained shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.^{1 a}

A bond, agreement, or covenant, made for a valuable consideration by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by such devise or bequest, subject to the same remedies on such bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had against the heirs of the testator, or his next of kin, if the same had descended to them.^b

A charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained shall pass and take effect, subject to such charge or incumbrance.^{c 2}

A conveyance, settlement, deed, or other act of the testator, by which his estate or interest in property previously devised or bequeathed by him, shall be altered, but not wholly divested,

to testator inclosed in an envelope with three seals. Testator having felt the seals, handed it back, with the seals unbroken, to J., directing him to throw it into the fire and burn it. J. pretended to do so, but in fact put the will into his pocket, and threw another paper into the fire, calling upon the testator to listen and hear it burn; and the testator smelling the paper burning, believed the will destroyed as he directed, and died in that belief. After testator's death the will was produced and admitted to probate. *Held*, 1. That such facts do not amount to a revocation under the statute, no sign or symbol of such attempted revocation appearing upon the paper itself. 2. That the devisee can not, under such circumstances, be declared a trustee for the heirs at law of the property bequeathed. *Kent et al. v. Mahaffey et al.*, 10 Ohio St. 204.

(1) A written will can not be revoked by a subsequent verbal one, *McCune's Heirs v. McCune's Adm'rs*, 8 Ohio, 144. See note 2, p. 16.

(2) See note 2, p. 15.

(a) § 5953.

(c) § 5955.

(b) § 5954.

shall not be deemed a revocation of the devise or bequest of such property, but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin ; unless, in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest.^{1a}

But if the provisions of the instrument, by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen.^b

A will executed by an unmarried woman shall not be deemed revoked by her subsequent marriage.^c

If the testator had no children at the time of executing his will, but shall afterward have a child living, or born alive after his death, such will shall be deemed revoked, unless provisions shall have been made for such child by some settlement, or unless such child shall have been provided for in the will, or in such way mentioned therein as to show an intention not to

(1) A deed of conveyance made subsequently to a devise does not revoke the will, unless it makes an entire disposition of the estate ; but to any portion undisposed of by the deed, the will attaches *pro tanto*, and carries it to the devisee. *Brush v. Brush et al.*, 11 Ohio, 287.

A testator can not, by any words of exclusion used in his will, disinherit one of his lawful heirs, in respect to property not disposed of by his will. Such words can not be used to control the course of descent, so as to carry his property to his other heirs. They can not be used to raise an estate by implication in favor of his other heirs, there being no attempt in the will to dispose of the property or to create any interest therein. *Crane v. Doty*, 1 Ohio St. 279.

When a devise is of all the real and personal estate, and the testator sells the real estate after the making of his will, the proceeds remaining on hand, and not otherwise disposed of at the testator's death, will pass to the devisee as personalty. *Kent et al. v. Mahaffey et al.*, 10 Ohio St. 204.

(a) § 5956.

(c) § 5958.

(b) § 5957.

make such provision, and no other evidence to rebut the presumption or [of] revocation shall be received.^{1a}

If, after making a will, a testator execute another, and afterward destroy, cancel, or revoke the second, the first one is not thereby revived, unless by the terms of such revocation it appear that it is his intention to revive it; unless, after having canceled, destroyed, or revoked the second, he duly publish the first will.^b

When a testator, at the time of executing his will, shall have a child absent and reported to be dead, or having a child at the time of executing the will, shall afterward have a child who is not provided for in the will, the absent child, or the child born after the execution of the will, will take the same share of the estate, both real and personal, that he would have been entitled to if the testator had died intestate, toward raising which portion the devisees and legatees must equally contribute, in proportion to the value of what they shall respectively receive under the will, unless, in consequence of a specific devise or bequest, or of some other provisions in the will, a different apportionment among the devisees and legatees shall be found necessary, in order to give effect to the intention of the testator, as to that part of the estate which shall pass by the will: provided, that if such child, supposed to be dead at the time of the execution of the will, shall have a child or children, provision for whom is made by the testator, the other legatees and devisees can not be required to contribute, but such child, supposed to have been dead, will take the provision made for his child or children, by the testator, or such part thereof as the circumstances of the case, in the opinion of the proper court,² may think just and equitable.^c

In settling the extent of the claim of any child, as provided for in the preceding paragraph, any portion of the estate of the testator received by a party interested, by way of advancement,

(1) Where a testatrix, having no child, made a will, and afterward had a living child, which she survived: *Held*, that the birth of the child revoked the will, and the fact that the testatrix survived the child did not revive the will. *Ash v. Ash*, 9 Ohio St. 383. See also (b), p. 173, this volume.

(2) The court of common pleas has jurisdiction in such a case. *McGarry v. Smith*, 22 Ohio St. 190.

must be deemed a portion of the estate, and charged to the party who has received the same.^a

CONSTRUCTION.—In the construction of a will, it is well settled as a permanent rule, in this state, that the intention of the testator, as gathered from the whole will, must control, when such intention is not in conflict with the law, or against public policy. It is also an established rule of construction, that words in a will are to be understood according to their ordinary and legal signification, unless it is manifest, from the context, or from other provisions in the will, that the testator has used them in a different sense, and unless the sense in which they were used is clearly apparent.¹

SEC. III. THE ADMISSION OF WILLS TO PROBATE AND RECORD.

No will can be admitted to probate without notice to the widow or husband and next of kin of the testator, resident in the state, in such way and for such time as the probate court shall direct or approve.^b

As to wills deposited in the probate court, see pages 17, 18, 19.

If the will be in the hands of any person other than the probate judge, for safe-keeping, the executor of such will, or any person otherwise interested therein, may cause the same to be brought into the probate court of any county in which the testator was possessed of real or personal estate at the time of his death, for probate;² and the court may, when necessary, by summary process,³ compel the person having the custody or control

(1) See Appendix, notes 37, 59, 60, 71, 83, 89, 95, 96; also notes pp. 4-21.

(2) Under the laws of this state, although the will of a testator, wherever domiciled at the time of his death, may be admitted to probate in any county in the state in which he may have left real or personal estate, yet if the testator were a resident of this state at the time of his death, *letters testamentary* on such probated will can issue only from the probate court of the county in which testator so resided. *Limes v. Irwin*, 16 Ohio St. 488.

The will of a person whose domicile, at the time of his death, is in this state, is properly admitted to original probate at the place of such domicile, without regard to where the will was made, or where such person died. *Converse v. Starr*, 23 Ohio St. 491.

(3) The process referred to is either citation, attachment, or warrant, and such process may be issued into any county in the state, and must be served

(a) § 5962.

(b) § 5917.

of such will to produce the same in court; ^{1a} and such person, for neglecting or refusing, without reasonable cause, to produce said will, after being duly cited for that purpose, may be committed to the county jail, and kept there till he produce the will; and he will be further liable for all damages caused to any aggrieved party for his neglect or refusal.^b

No lands, tenements, or hereditaments, will pass to any devisee in a will, who knows of its existence, and has the same in his power to control, for the term of three years, unless, within that time, he shall cause the same to be offered for, or admitted to, probate; and, by such neglect, the estate devised to such devisee will descend to the heirs of the testator.^c

To steal, destroy, or secrete a will or codicil, either before or after the death of a testator, or to procure the same to be done, is an offense punishable by imprisonment in the penitentiary of the state, not more than ten, nor less than one, year.^d

If a devise or bequest is given to a person who is a witness to the will, and the will can not otherwise be proved than by the testimony of such witness, the devise or bequest will be void, and the witness will be competent to give testimony of the execution of the will, in like manner as if such devise or bequest had not been made; and if such witness would have been entitled to any share of the testator's estate, in case the will was not established so much of such share as will not exceed the bequest or devise to him, will be saved to him; and the devisees and legatees must contribute for that purpose in the mode directed for absent or after-born child.^{2e}

The said court must cause the witnesses to such will, and such other witnesses as any person interested in having the same

and returned by the sheriff or other officer to whom it may be delivered; and such officer shall be liable for neglect in such service and return in like manner as sheriffs are or may be for neglect as to a *capias* upon an indictment. §§ 5921-5923.

(1) This refers to the original probate, and not to the admission to record of an authenticated copy of a probated will. *Carpenter v. Denoon et al.*, 29 Ohio St. 379.

(2) See p. 22.

(a) § 5921.

(b) § 5924.

(c) § 5943.

(d) § 6859.

(e) § 5924.

admitted¹ to probate, may desire, to come before such court; and said witnesses must be examined in open court, and their testimony reduced to writing, and filed.^a

To prevent delay in the probate of a will, an arrangement should be effected with the subscribing witnesses to appear voluntarily before the probate judge, on the day when it is intended first to present the will to him. This can in most cases be done, the executor will thereby avoid the necessity of appearing more than once before the probate judge in connection with the probate of the will. But if any of the above mentioned witnesses fail to appear voluntarily and testify, the probate judge may, in case such witnesses reside within the county, and are not infirm or otherwise unable to attend court, compel their attendance by subpoena and attachment, as in other cases. They are required to state whether they saw the testator subscribe such will at the end thereof; whether at the time of signing the same he was over twenty-one (or in case of a female over eighteen) years of age, of sound mind and memory, and not under any restraint; and whether they subscribed their names as witnesses in the presence of the testator.²

It is not absolutely essential that the subscribing witnesses should appear before the probate judge at the same time, and be examined together.

(1) On the proceeding authorized for admitting a will to probate, persons interested to resist the probate are not allowed to introduce evidence to contest its validity. An application to so admit the will is not an adversary proceeding. Those who are adversely interested are not required to be summoned, and no issue is made for a contest between adverse parties. In *re Hathaway*, 4 Ohio St. 383.

The *prima facie* effect which the statute gives to the order of probate can only be overcome by showing that the will is, in fact, invalid. *Converse v. Starr*, 23 Ohio St. 491.

Where a will, executed in due form, is probated and admitted to record on an application within the jurisdiction of the court, error will not lie to review the testimony upon which the order of probate was made. *Mosier v. Harmon*, 29 Ohio St. 220.

(2) Formerly it was necessary that the witnesses should state that they attested the will at the request of the testator. See note 1, p. 4.

(a) § 5926.

If it should appear to the court, when the will is offered for probate, that any witness thereto is gone to parts unknown; or if the witnesses to a will were competent at the time of attesting its execution, and afterward became incompetent, or the testimony of any witness can not for any reason be obtained within a reasonable time, the will may be admitted to probate, and allowed upon such proof as would be satisfactory, and in like manner as if such absent or incompetent witnesses were dead.^a

The court may issue a commission, with the will annexed, directed to any suitable person or persons to take the deposition of any witness to a will who resides out of the jurisdiction of the court, or who resides within it and is infirm and unable to attend court; and every deposition so taken, certified, and returned by any one or more of the persons named in such commission, will be as valid as if taken in open court.^b

If it shall appear that such will was duly attested and executed, and that the testator, at the time of executing the same, was of full age and of sound mind and memory, and not under any restraint, the court must admit the will to probate.^c

Every will, when admitted to probate, shall be filed in the office of the probate judge, and recorded,¹ together with the testimony, by said judge or his clerk, in a book which must be kept by him for that purpose.^d

A copy of the will, under the seal of the court, is usually made for the benefit of the executor, and attached to his letters testamentary; but the original will remains on file in the office of the probate judge.

A copy of such recorded will, with a copy of the order of probate annexed thereto, certified by the said judge of probate under

(1) The order of a court of probate which recites that the will was presented to the court for probate, and the subscribing witnesses were sworn and examined in open court, and their testimony was reduced to writing and filed by order of the court; and that, thereupon, the court ordered the will to be filed and admitted to record, is sufficient evidence that the will was proved in accordance with law, and ordered to be recorded. *Holman v Riddle et al.*, 8 Ohio St. 384. See also note 1, p. 25.

(a) § 5927.

(b) § 5928

(c) § 5929.

(d) § 5930.

seal of his court, shall be as effectual in all cases as the original would be, if produced and established by proof.^a

If real estate devised by will is situate in any other county than that in which the will is proved, an authenticated copy of the will and order of probate must be admitted to record in the office of the probate judge of each county in which such real estate may be situate, upon the order of such probate judge, and will have the same validity therein as if probate had been made in such county.^b

If no person interested shall, within two years after probate had, appear and contest the validity of the will, the probate shall be forever binding, save, however, to infants, married women, and persons absent from the state, or of insane mind, or in captivity, the like period, after the respective disabilities are removed.^{1c}

In case of the refusal to admit a will to probate, any person aggrieved thereby may appeal from such decision to the next term of the court of common pleas, by filing notice of his intention to appeal within ten days.^d

The person appealing must procure and file in the court of common pleas a certified copy of the order of said probate court, rejecting the will, together with the will, and thereupon said appeal will be deemed perfected.^{2e}

(1) A will set aside at the instance of any person included within the saving clause of the statute is wholly annulled, and the entire estate will be distributed according to law. *Meese v. Keefe*, 10 Ohio, 372. See p. 34.

(2) No bond is required of the party appealing in such case. The law prescribes the duties of the respective courts in such cases as follows: "The court of common pleas, on the hearing, shall take testimony touching the execution of such will, and have the same reduced to writing; and the final order of the court of common pleas shall, together with the will and testimony so taken, be certified by the clerk to the probate court; and if by such order the will is admitted to probate, the will, order, and testimony shall be recorded in the probate court. Whenever the probate court shall receive from the clerk of the court of common pleas a certificate that a petition has been filed in the court of common pleas to contest the valid-

(a) § 5931.

(b) § 5932.

(c) § 5933.

(d) § 5934.

(e) § 5935.

Authenticated copies of wills, executed and proved according to the laws of any state or territory of the United States, relative to any property in the State of Ohio, may be admitted to record in the probate court of any county in this state, where any part of such property may be situated; and such authenticated copies, so recorded, shall have the same validity in law as wills made in this state, in conformity with the laws thereof, are declared to have: provided, that where any such will, or authenticated copy has been or shall hereafter be admitted to record, in the probate court of any county in this state, where any part of such property may be situated, a copy of such recorded will, with the copy of the order to record the same, annexed thereto, certified by the probate judge, under the seal of his court, may be filed and recorded in the office of the probate judge of any other county in this state, where any part of such property is situated, and it will be as effectual, in all cases, as the authenticated copy of said will would be if proved and admitted to record by the court.^a

A will executed, proved, and allowed, in any country other than the United States and territories thereof, according to the laws of such foreign state or country, may be allowed and admitted to record in this state, in the manner and for the purpose mentioned in the following paragraphs.^{1b}

ity of any will admitted to record or recorded in the probate court, the probate court shall forthwith transmit to the court of common pleas the will, testimony, and all papers relating thereto, with a copy of the order of probate, attaching the same together and certifying the same under the seal of the court; and a copy of the final judgment, on such contest, shall be certified by the clerk of the court of common pleas to the probate court; and the said clerk shall also transmit to the probate court the will and other papers transmitted as aforesaid to the common pleas; and the same shall be deposited and remain in the probate court." §§ 5935, 5936.

(1) *Meese et ux. v. Keefe et al.*, 10 Ohio, 362. The Law of 1831 was otherwise. *Bailey v. Bailey et al.*, 8 Ohio, 239.

M., domiciled in Ohio, made a will of personalty in the olographic form (valid by the laws of Louisiana), while in New Orleans on a visit. He returned to his home in Ohio, and died there in 1848. The will was sent to

(a) § 5937.

(b) § 5938.

*A copy of the will and probate thereof, duly authenticated must be produced by the executor, or by any person interested therein, to the probate judge of the county in which there is any estate upon which the will may operate, whereupon said probate judge must continue the motion to admit such will to probate, for the term of two months, and notice of the filing of such application must be given to all persons interested, in some public newspaper, printed or in general circulation in the county where such motion is made, at least three weeks successively; the first publication to be at least forty days before the time set for the final hearing of said motion.^a

Unless such will be offered for record within four years from the date of its probate, the title of any *bona fide* purchaser to any real estate within this state, derived from the heirs of the testator, without knowledge of the existence of the will, can not afterward be defeated by the production of the will. The rights of married women, minors, and insane persons, will not be concluded by any delay or failure to record such will, until two years after their respective disabilities are removed.^b

If, on hearing, it shall appear to the court that the instrument ought to be allowed in this state, the court must order the copy to be filed and recorded; and the will, and the probate and record thereof, will then have the same force and effect as if the will had been originally proved and allowed in the same court,

New Orleans and admitted to probate, and an authenticated copy was admitted to record in Ohio. In proceedings to set aside the will, it was held that the copy of the will was improperly admitted to record in this state. That by the settled rule of the international law, the jurisdiction to determine the validity or invalidity of the will belonged to the courts of this state; and that the 28th section of the wills act of 1840, providing for the admission to record in this state of "authenticated copies of wills, executed and proved according to the laws of any state or territory of the United States," relates only to wills *proved* in a court to which the jurisdiction to make original probate in the case properly belongs, under the established rules of law. *Manuel et al. v. Manuel*, 13 Ohio St. 453.

The laws of Ohio govern in the construction of both foreign and domestic wills disposing of lands situate in this state. *Jennings v. Jennings*, 21 Ohio St. 56. See note 3, p. 35.

(a) § 5939.

(b) § 5967.

in the usual manner: provided, however, that nothing herein contained shall be construed to give any operation or effect to the will of an alien, different from what it would have had if originally proved and allowed in this state.^a

After allowing and admitting to record a will, pursuant to any of the four preceding paragraphs, the court may grant letters testamentary thereon, or letters of administration with the will annexed, and must proceed in the settlement of the estate that may be found in this state, and the executor taking out letters, or the executor with the will annexed, shall have the same power to sell and convey the real or personal estate, by virtue of the will or the law, as other executors or administrators with the will annexed, shall or may have by law.^b

No will shall be effectual to pass real or personal estate, unless it shall have been duly admitted to probate or record, as provided in this chapter.^{1c}

SPOLIATED WILLS.

The probate court² shall have full power and authority to admit to probate, any last will and testament which such court may be satisfied was duly executed according to the provisions of the law upon the subject in force at the time of the execution of such last will and testament, and not revoked at the death of the testator, when such original will has been lost, spoliated, or destroyed, subsequent to the death³ of such testator, or after the

(1) *Wilson's Ex'rs v. Abraham et al.*, 8 Ohio, 239; *Lessee of Swasey's heirs v. Blackman et ux.*, 8 Ohio, 5; *Lessee of Hall et al. v. Ashby et al.*, 9 Ohio, 96. But a will executed in another state takes effect from the death of the testator, and not from the date of its registry in Ohio; *Lessee of Hall et al. v. Ashby et al.*, 9 Ohio, 96.

(2) A court of chancery can not entertain jurisdiction to set up and establish a lost or destroyed will. The jurisdiction is with the probate courts. *Morningstar v. Selby*, 15 Ohio, 345.

(3) The legislation of this state, as it now exists, does not permit a will lost, spoliated, or destroyed, to be established, unless it existed subsequently to the death of the testator. In the matter of *Mary Sinclair's will*, 5 Ohio St. 290.

(a) § 5940.

(c) § 5942.

(b) § 5941.

testator has become incapable of making a will by reason of insanity, and it can not be produced in court in as full, ample, and complete a manner as such court now admits to probate last wills and testaments, the originals of which are actually produced in court for probate.^a

In all cases where application shall be hereafter made to the probate court to admit to probate a will duly executed as aforesaid, and which has been lost, spoliated, or destroyed, as aforesaid, it shall be the duty of the party seeking to prove the same, to give a written notice to all persons whose interest it may be to resist the probate, and who reside in the county where the testator resided at the time of his death, or to their agent or attorney, five days before the day on which such proof is to be made, or to give notice, by publication in a newspaper printed in the county, thirty days before the day set for hearing such proof.^b

In all such cases, the said court must cause the witnesses to such will so executed and lost, spoliated, or destroyed, and not revoked, and such other witnesses¹ as any person interested in having such will admitted to probate may desire to come before such court, and said witnesses shall be examined by said probate judge, and their testimony reduced to writing and filed by him in this court: provided, that in all cases where it may be necessary so to do, in consequence of witnesses residing out of the jurisdiction of the court, or who reside within such jurisdiction and who are infirm or unable to attend court, the court may order the testimony of such witnesses to be taken and reduced to writing by some competent person, which testimony must be filed in such probate court.^c

If the court, upon such proof, shall be satisfied that such last will and testament was duly executed in the mode provided by the law in force at the time of the execution, that the contents thereof are substantially proved, and that the same was unrevoked

(1) Persons interested adversely to the probate of a will can not introduce testimony before the probate court to contest its validity. In the matter of Henry Hathaway's will, 4 Ohio St. 383. See notes 102, 103, p 353.

(a) § 5944.
(b) § 5945.

(c) § 5946.

at the death of the testator, and has been lost, spoliated, or destroyed subsequent to the death of such testator, or his becoming incapable, as aforesaid, such court must find and establish the contents of such will as near as the same can be ascertained, and cause the same and the testimony taken in the case to be recorded in said court.^a

The contents of any such last will and testament so found, established, and admitted to probate, as aforesaid, will be as effectual to pass real and personal estate, and for all other purposes, as if the original will had been admitted to probate and record, according to the provisions of this chapter; and such wills shall, in all respects, be governed by the laws in force relating to other wills, not only as relates to the contest of the same, but in all other matters.^{1 b}

NEW RECORD OR PROBATE WHEN RECORD OF WILL DESTROYED.

When the record of any will has been or shall hereafter be destroyed, a copy of such will and the probate thereof may be recorded by the probate court of the proper county, whenever it shall be made to appear to the satisfaction of the court that said record has been destroyed, and whenever it shall further appear, by a certificate, under the hand and seal of the probate judge, or clerk of the court of common pleas of the proper county, that such copy is a true copy of the original will and the probate thereof.^c

When the record of any will has been, or shall hereafter be, destroyed, as aforesaid, the original will may be again admitted

(1) Where the contents of a spoliated will have been found, admitted to probate, and recorded, in a proceeding duly had in the probate court for that purpose, such record is *prima facie* evidence, in a future proceeding to contest the validity of said will, not only of the due attestation and execution of said will, but also of its contents; and on the trial of the issue whether the will admitted to probate is the last will of the testator or not, the same must stand, unless the jury are satisfied, by a preponderance of proof, that it is not, in substance, the will of the testator. *Banning et al. v. Banning et al.*, 12 Ohio St. 437. See notes 102, 103, p. 353.

(a) § 5947. See also 80 O. L. 24. (c) § 5949.

(b) § 5948.

to probate and record in the same manner provided for the probate of wills.^a

The probate court of any county, where the record of any will has been or shall hereafter be destroyed, may admit to record a copy of said will, whenever it shall appear that such copy produced for record bears the certificate of any probate judge or clerk of the court of common pleas setting forth that the same is a true copy of the will, the record of which has been destroyed: provided, that nothing in this or the next two preceding paragraphs shall be so construed as to affect the proceedings or extend the time for contesting the validity of any will, or for asserting any rights thereunder, and the record provided for in the preceding paragraphs must show that the original record was destroyed, and the time as near as may be, when the will was originally admitted to probate and record.^b

It is hereby made the duty of every probate judge, who shall admit to record any will or copy thereof, under the provisions of either of the three preceding paragraphs, immediately thereafter to give notice for three consecutive weeks, in two weekly newspapers of his county, if so many be published therein, or if not, in one newspaper published and of general circulation therein, stating the name of the person, the record of whose will has been destroyed, and the day when said record was supplied; and all persons interested in said record shall have the right at any time within five years from the making of said new record, to come into the probate court of the proper county, and contest the question whether the record thus supplied is the same as the record destroyed; and from all final orders and decrees of the probate court in such contest, either party may appeal to the court of common pleas, in such manner as appeals are now or hereafter may be provided for from the probate court; and if any person interested in said record shall, at the time such record is supplied, be under any legal disability, such person shall have the right to contest said record within two years from the removal of such disability; and such new record supplied, according to either of the three preceding paragraphs, shall, unless

(a) § 5950.

(b) § 5951.

set aside in the proceedings provided for in this paragraph, have the same force, effect, and validity, as the original record.^{a 1}

SECTION IV.

PROCEEDINGS TO CONTEST THE VALIDITY OF WILLS.

When a will is admitted to probate by the probate court, or if, on appeal, it should be admitted by the court of common pleas, any person interested in such will, or in the estate of the testator, may, within two years after the probate, bring a civil action in the court of common pleas of the county in which such will was admitted to probate, to contest its validity.² All the devisees, legatees, and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties to the action. An issue being made up, the validity of the will is tried by a jury,³ whose verdict is final between the parties (unless a new trial be granted, or an appeal be taken to the district court), except as to married women, minors, insane persons, persons absent from the state, and persons in captivity, who are not bound by such verdict until two years after their respective disabilities are removed.^b

Upon the trial in the court of common pleas or district court, the order of the probate court admitting the will to probate will be *prima facie* evidence of the due execution, attestation, and validity of such will.⁴ And in case any witness examined in the probate court at the time the will was admitted to probate, should

(1) As to how appeals are taken, see Chapter XIV., Section I. Also p. 27.

(2) In *Raudebaugh et ux. v. Shelley et al.*, 6 Ohio St. 307, it was held that the provisions of the code did not repeal the 20th section of the statutes of wills passed May 3, 1852, nor take away the right to proceed in chancery to contest the validity of a will. See also notes 103-107, p. 353.

(3) It is error in a court to proceed by mere decree, and without the intervention of a jury, to set aside a will. *Holt et al. v. Lamb*, 17 Ohio St. 374.

(4) See *Holman et al. v. Riddle et al.*, 8 Ohio St. 384.

So, also, if the contest is with regard to the validity of a will lost or destroyed. *Banning et al. v. Banning et al.*, 12 Ohio St. 437. See note 2 p. 43.

die previous to the time of trial in the court of common pleas, or, for any cause, become incompetent to testify, or should remove beyond the jurisdiction of the court, a certified copy of his or her testimony in the probate court will be admissible in evidence upon the trial in the common pleas.^{1 a}

An appeal may be taken from the verdict of the jury, and the order of the court in relation thereto, to the district court of the county, as in other cases.^b (See note 1, p. 34.)

When the case is finally determined, the judgment of the common pleas or district court relative to such will must be certified to the probate judge, and the will returned to and deposited with him.^c

The validity of a will executed and proved according to the laws of any state or territory of the United States, or of any foreign country relating to property in this state, can not be contested here;³ but if the will be set aside in the state, territory, or country in which the same was executed and proved, it will be invalid in this state so far as relates to all persons claiming under such will and having notice of its being so set aside; and as to persons having no notice of the setting aside of the will, the same will be invalid from the time when an authenticated copy of the decree of the court setting the same aside is filed in the office of the probate judge of the county in which the will is recorded.^c

(1) On the trial of an issue in a proceeding under the statute, to contest the validity of a will, declarations of a legatee or devisee who is a party defendant to the proceeding, with reference to the mental capacity of the testator, are not admissible in evidence to impeach the will, where there are other devisees or legatees whose interests may be injuriously affected by the admission of such evidence. *Thompson et al. v. Thompson et al.*, 13 Ohio St. 356.

(2) An executor is not bound by law to assume the defense of a will in a proceeding to contest its validity; and he can not charge the estate, in the settlement of his account, with the expense of maintaining such defense, if the will be adjudged to be invalid. *Andrews' Ex'rs v. Andrews' Adm'rs*, 7 Ohio St. 143.

(3) See note 1, p. 28. See also *Jones et al. v. Robinson et al.*, 17 Ohio St. 171.

(a) §§ 5862, 5863.

(c) § 5967.

(b) § 5865.

SECTION V.

WIDOWS' ELECTION TO TAKE UNDER WILL.

If any provision be made for a widow, in the will of her husband, it will be the duty of the probate judge, forthwith after the probate of such will, to issue a citation to said widow, to appear and make her election, whether she will take such provision, or be endowed of the lands of her said husband and take her distributive share of his personal estate; and said election shall be made within one year¹ from the date of the service of the cita-

(1) An election formally made and entered upon the journal at her instance, can not afterward, and within a year from the probate, be set aside by her at pleasure. The probate judge has no authority to cancel an election previously made and entered upon his journal, for an alleged mistake of the party so electing, as to the provisions and effect of the will. Such election when made and recorded, can be vacated only on petition to the court of common pleas, or other court having general equity jurisdiction. *Davis et al. v. Davis*, 11 Ohio St. 386.

Where a widow, without following the form prescribed for making an election to take under a will, sets up no dower, but actually and in fact takes under the will, using and occupying the lands devised to her by the will, for a series of years, she is barred of her dower, and can not afterward refuse to take under the will. *Lessee of Thompson v. Thompson et al.*, 6 Ohio St. 480.

A testator died without issue, devising his real estate, and all his personal estate except a few legacies of small amount, to his widow. The widow, without electing to take under the will, died, leaving a will, by which she disposed of the property so devised to her. In an action by the brothers of the husband, to recover the personal estate, it was held that if the widow, by reason of not electing to take under the will, was barred of her right to claim the personal estate by the terms of the will, she would still be entitled to claim the same as "next of kin." *Gardner et al. v. Gardner's Ex'rs et al.*, 13 Ohio St. 426.

Where a widow declines to take under a will, a devise to another of the same lands given the widow for life, to take effect after the death of the widow, will not lapse, but will take effect as an executory devise. *Lessee of Thompson et al. v. Hoop*, 6 Ohio St. 480.

Where a widow actually accepts the provision made for her in a will, and then dies, without making her statutory election in court, and without having been cited to appear in court for that purpose, she will be held to have

tion aforesaid; but she shall not be entitled to both, unless it plainly appears by the will to have been the intention¹ that she should have such provision in addition to her dower and distributive share.^a

The election of the widow to take under the will, must be made by her in person, in the probate court of the proper county, except as provided in the three next paragraphs; and on the application by her to take under the will, it shall be the duty of the court to explain to her the provisions of the will, her rights under it², and by law in the event of her refusal to take under the will. The election of the widow to take under the will must be entered upon the minutes of the court; and if the widow shall fail to make such election, she will retain her dower, and such share of the personal estate of her husband as she would be entitled to by law in case her husband had died intestate, leaving children. If she elect to take under the will, she will be barred of her dower and such share, and take under the will alone, un-

taken under the will, and her representatives will be entitled to no part of the personal estate, except what is given her by the will. *Baxter's Adm'rs v. Bowyer et al.*, 19 Ohio St. 490. See notes 34-38, 88, 94, pp. 342-351.

(1) A testator having by his will divided his real and personal estate between his widow and two children, giving the widow and her heirs forever one-third of the real estate and more than one-third of the personalty, in a subsequent clause of the will declared that the devises and bequests to his wife were not intended to be and were not in lieu of dower in either his real or personal estate, it was held that the widow, having elected to take under the will, and the personal property not being intestate, she is not entitled to a distributive share of the personal property under the statute. *Parker et al. v. Parker's Adm'rs et al.*, 13 Ohio St. 95.

Where W. died testate as to part of his property, and intestate as to the residue, leaving a widow who elected to take under his will: *Held*, that such election did not bar the right of such widow to her distributive share of the personal estate, not disposed of by the will. *Bane v. Wick*, 14 Ohio St. 505. See also note 1, p. 8, and notes in Appendix, referred to above.

(2) The entry of an election by a widow, in the probate court, to take under the will of her deceased husband, need not show affirmatively that the judge had explained to her the provisions of the will, etc., and, in the absence of averment or proof to the contrary, such explanation will be presumed. *Davis et al. v. Davis*, 11 Ohio St. 386.

(a) § 5963. In case of contest of will, see 77 O. L. 307.

less as provided in the next preceding paragraph. But the widow's election to take under the will, will not bar her of the right to remain in the mansion of her husband, and to receive one year's allowance for the support of herself and children, as provided by law, unless the will shall expressly otherwise direct.^{1a}

But if the widow be in ill health, and unable to attend court, or, if she be a non-resident of the county in which the will was proved, it is the duty of the probate judge, on application being made to him in her behalf, to issue a commission, with a copy of the will annexed, to some suitable person, authorizing him to take the election of such widow, and expressly instructing him to explain to her what her rights are under the will and under the law, previous to taking such election.^b

The election of the widow to take under the will, whether made in person to the probate court or to such commissioner, must be entered upon the minutes of the probate court.²

If the widow of a testator be imbecile or insane, and unable to make an election for herself, it is incumbent upon the probate judge, within one year from the death of the testator, and as

(1) *Collier v. Collier's Ex'rs*, 3 Ohio St. 369.

And she can claim these rights, even though the will expressly state that the provision made for her therein shall be in lieu of dower, and all other claims against the estate of the testator. *Collier v. Collier's Ex'rs*, 3 Ohio St. 369.

The widow's election to take under a will does not estop her from setting up her right as heir to the estate, nor from contesting the validity of the devises therein. *Carder v. Comm'rs of Fayette Co.*, 16 Ohio St. 353.

The right of the widow to remain in the mansion house of her deceased husband, as provided by law, is not restricted to a personal continuance in the house merely, but she is entitled to a reasonable enjoyment of the possession of the premises, and may therefore either personally occupy them, or she may rent them, as she may deem best promotive of her comfort. *Conger v. Atwood*, 28 Ohio St. 134.

If the administrator of her husband's estate assumes to control said house, and rents it to another, the widow is entitled to the rents received by him during the period she is entitled to remain in the premises, and she can collect said rents from him either in his personal or representative character, as she may elect. *Ib.* See p. 145, for law as to mansion-house.

(2) See note 2, p. 37.

(a) § 5964.

(b) § 5965.

soon as the facts come to his knowledge, to appoint some suitable person to determine the value of the provision made for the widow by the will; and also the value of her dower estate in her husband's real property; and after report made by such appraiser, if the probate judge is satisfied that the provisions of the will are better for the widow than her dower at law, he is required to enter upon his journal, in the name of the widow, her election to take under the will; and such election so made shall have the same force and effect as an election made by one not under such disability.^a

SECTION VI.

THE POWERS OF EXECUTORS WITH RESPECT TO REAL ESTATE.¹

When power is vested in the executors of a will to sell the real estate of the testator, they can make such sale without first obtaining an order of court for that purpose;¹ and if the right to sell be conferred upon them by the will they may execute a deed or deeds without being specially empowered to do so by the will; the power to convey being presumed to be annexed to the power to sell. And in case one of two or more executors should die, or should refuse or neglect to take upon himself the execution of the will, the surviving executor or executors in the one

(1) For decisions relating to such powers, see Appendix 55-58, 63-69, 75-81, 90; also *Rammelsberg v. Mitchell et al.*, 29 Ohio St. 22; *Stapleton v. Elison*, 21 Ohio St. 527. See p. 129.

(2) But where no authority exists by will to sell real estate, an executor can not in any case make sale of lands by private contract, nor without first obtaining an order of court to sell. *Lessee of Goforth v. Longworth*, 4 Ohio, 129.

See also *Ludlow's Heirs v. Park*, 4 Ohio, 5.

A testator invested his executor with the following powers: "Full, ample, and complete power to dispose of, in such manner as he thinks proper, all my estate, of every description, real and personal," etc. *Held*, that this authorized the executor to sell the real estate of the testator. *Steele et al. v. Worthington*, 2 Ohio, 182.

(a) § 5966.

case, and the executor or executors who qualify, in the other, may sell and convey such real estate; and his or their deed will be as valid as if signed by all the executors named in the will. And should all the executors who take out letters testamentary die, resign, or be removed before the sale or conveyance of such estate, or after sale, but before conveyance, or should none of the executors named in the will take upon themselves the execution of the same, an administrator with the will annexed may convey, or sell and convey the property, as fully and effectually as the executors named in the will might have done were they still living, or had they qualified, as the case may be.^a

An executor appointed by a foreign will, admitted to record in the state, taking out letters testamentary here, or an administrator with such foreign will annexed, has the same power, by will or the law, to sell and convey real estate situate in this state, as if the will had been executed and proved within the state.^b

If a testator confer upon his executor full power to dispose of his real estate in such manner as he may think proper in order to carry out the purposes of his will, or if he authorizes his executor to sell his real estate whenever it can be done to advantage, and to pay over the proceeds to certain legatees, the executor is entitled to the possession of such real estate, and not the heirs of the testator.¹ But if he resigns, his power to sell ceases, and a deed afterward made by him would convey no title.²

SECTION VII.

TRUSTS AND TRUSTEES.

As before observed,³ a trust should be so distinctly expressed that the wishes of the testator with respect thereto can not be misunderstood, nor the trust fail for uncertainty in its object or in the method of its execution.

Every trustee appointed in any will must, before entering

(1) *Dabney v. Manning et al.*, 3 Ohio, 321; *Lessee of Williams v. Veach et al.*, 17 Ohio, 171.

(2) See note 79, p. 349.

(3) Section I, this chapter.

(a) § 5980.

(b) § 5941.

upon the discharge of his duty as such trustee, execute a bond, with freehold sureties, payable to the state, in the probate court of the county in which any such will may be admitted to probate, to the satisfaction of said court, conditioned for the faithful discharge of his duties as such trustee: provided, that when by the terms of any will, the testator shall express a wish that his trustee may execute the trust without giving bond, the court admitting the will to probate may, at [its] their discretion, grant permission to the trustee to execute the trust with or without bond, as may seem expedient; and when granted without bond, the court may, at any subsequent period, upon the application of any party interested, require bond to be given; and provided further, that the court, upon the application of any party interested, may, if deemed necessary, require a new or additional bond at any time before the completion of the trust.^a

In all trusts heretofore created by will and not fully discharged, the probate court, on the petition of any person interested, and after notice to the trustee, must, where not otherwise directed in the will, and deemed unnecessary by the court, require a bond, as provided in the next preceding paragraph.^b

If any trustee aforesaid shall not give bond within such time as shall be ordered by the court, he must be removed from his trust, or be considered to have declined it, as the case may be; and some other person may be appointed in his stead, upon giving the required bond.^c

When two or more persons shall be appointed trustees by any will, the probate court may take a separate bond from each, with sureties, or a joint bond from all, with sureties.^d

When two or more trustees are appointed by will to execute a trust, and one or more of them die, decline, resign, or are removed, the survivors or remaining trustees or trustee may execute the trust, unless the terms of the will express a contrary intention.^e

(1) Where a loss accrues to a trust fund through the default of one of five trustees appointed by a will, his co-trustees will not be held responsible for

(a) § 5981.

(b) § 5982.

(c) § 5983.

(d) § 5984.

(e) § 5985.

If any testamentary trustee shall die, decline to accept, resign, become incapacitated, or removed, and such will has not provided for the contingency of the death, incapacity, or refusal of such trustee or trustees to accept or execute the trust, the probate court having probate of said will may appoint some suitable person or persons to execute the trust according to the will, who shall give bond with security, as provided herein.^a

Trusts created by a will made out of this state, and relating to lands situated in this state, may, after the will is duly admitted to record in this state, be executed as hereinafter provided.^b

If a trustee is named in such foreign will, he may execute the trust, upon giving bond to the State of Ohio, in such sum and with such sureties as shall be approved¹ by the probate court of the county in which said lands, or any part thereof, are situate, conditioned to discharge with fidelity the trust reposed in him: provided, that when the testator in the will naming the trustee shall have ordered or requested that bond should not be given by said trustee, the bond shall not be required, unless, from a change in the situation or circumstances of the trustee or for other sufficient cause, the court of probate shall think proper to require it.^c

If a trustee has been appointed by a foreign court according to the laws of the foreign jurisdiction, he may execute the trust upon giving bond as provided in the preceding section, and satisfying the probate court of the county in which such lands, or any part of them, are situate, by an authenticated record of his appointment, that he has been duly appointed trustee to execute the trust.^d

The probate court of the county where property affected by the trust is situated, may, when necessary, on application by pe-

such loss, if they have acted in good faith, and exercised that vigilance over the fund which a man of ordinary prudence will exercise over his own property. *The State v. Guilford et al.*, 18 Ohio, 500. See also *Mathews v. Meek*, 23 Ohio St. 272.

(1) See note appended to form 147, p. 316.

(a) § 5986.

(b) § 5987.

(c) § 5988.

(d) § 5989.

tition by the party or parties interested, appoint a trustee to carry into effect a trust created by a foreign will ; which trustee, before entering upon his trust, shall give bond,¹ with such security, and in such amount, as such court shall direct.^a

SECTION VIII.

NUNCUPATIVE OR VERBAL WILLS.

A verbal will, made in the last sickness, shall be valid in respect to personal estate,² if reduced to writing, and subscribed by two competent disinterested witnesses, within ten days after the speaking of the testamentary words ; and if it be proved, by said witnesses, that the testator was of sound mind and memory, and not under any restraint, and called upon some person present, at the time the testamentary words were spoken, to bear testimony to said disposition as his will.^b

No nuncupative will shall be admitted to record, unless the same shall be offered for probate within six months after the death of the testator.^c

The expense of proving and recording wills, must be paid by the party at whose instance the same is done ; and the witnesses and officers shall have the like fees for attendance and services as in other cases ; and upon the executor or administrator being appointed the expense must be reimbursed out of the estate.^d

(1) See note, p. 316.

(2) Direction by an owner in respect to a disposition of his property, to take effect after his death, and different from such as the law would prescribe in case of intestacy, are of no validity unless made through the medium of a last will and testament. *Phipps v. Hope*, 16 Ohio St. 586.

In a suit to contest the validity of a nuncupative will, it is competent to prove that the testamentary words reduced to writing and probated are not the words spoken by the testator ; and it is not error for the court to instruct the jury that, if the words reduced to writing and probated are not substantially the same as those spoken, the will is invalid. *Bolles v. Harris*, 34 Ohio S. 38

(a) § 5990.

(b) § 5991.

(c) § 5992.

(d) § 5993.

CHAPTER II.

RELATING TO THE APPOINTMENT, BOND, SURETIES, AND LETTERS OF EXECUTORS AND ADMINISTRATORS, AND THE MANNER IN WHICH THEY MAY BECOME DIVESTED OF THEIR POWERS.

SECTION I.

TO WHOM LETTERS TESTAMENTARY WILL BE GRANTED ; WITH SUNDRY MATTERS RELATING SPECIALLY TO EXECUTORS AND ADMINISTRATORS WITH THE WILL ANNEXED.

UPON the death of any person residing within this state, leaving a valid will, and naming therein an executor who is legally competent to discharge the trust, such executor is entitled to the administration of the estate of the testator in preference to all other persons.^{1 a} (6)

Married women, insane persons, and persons under twenty-one years of age, during their minority, are not legally competent to be the executors of a will.²

When a person under the age of twenty-one years is named executor of a will, letters testamentary will not issue to him until he attains his majority ; and in the meantime, administration with the will annexed will be granted to some competent person by the probate court, unless there be another executor named in the will who is willing to accept the trust and legally capable of executing the same, in which case letters testamentary will issue to such competent executor, and he may proceed to administer the estate until such minor arrives at full age and obtains letters testamentary ; after which they may jointly discharge the duties of their appointment.^b

(1) The laws of this state do not recognize an executor *de son tort*. Benjamin v Le Barron's Adm'r, 15 Ohio, 527.

(2) As to married women, see Giaque's Manual for Guardians, pp. 312, 297.

(a) § 5995.

(b) § 6001.

In case the person designated by a testator to be the executor of his will should refuse to accept the trust (1); or being first duly cited (2), should neglect to appear and accept the same; or should fail to give bond within twenty days after the probate of the will; or be legally disabled from executing such will; or, after obtaining letters testamentary, should die, resign, or be removed; or, being an unmarried woman at the time of the issuing of the letters, should subsequently marry; or, in case the testator fail to name an executor of his will, letters of administration with the will annexed (10) will issue to the persons entitled to the administration in the order of priority established by law in the case of intestate estates.^a

But should two or more persons be named executors of a will, and all, or any two of the number, should take upon themselves the execution of the same, and one or more should subsequently resign, be removed, or die, the survivor or survivors may proceed with the settlement of the estate; and no letters of administration with the will annexed will issue so long as there is one executor capable and willing to execute the trust. But no one shall intermeddle or act as such executor, except those who actually give bond, unless excused from so giving by the will and the court.^b

When a will, executed in any other state or territory of the United States, or in any foreign country, and admitted to probate according to the laws of the place where executed, is admitted to record here, the probate court of the county in which the same is admitted to record may grant letters testamentary (10) to the executor named in the will, or letters of administration with the will annexed (10), as circumstances may require; and such letters will extend to all the property of the testator within the state.^c

Every executor, whether appointed by will executed and proved in this state, or named in any foreign will admitted to record here, and every administrator with the will annexed, before entering upon the discharge of his duties, must give bond to the State of Ohio (8) (unless specially exempt from so doing

(a) §§ 6000, 6015, 6022.

(c) §§ 5938-5941.

(b) §§ 5995, 6022.

by the terms of the will), in such sum as the probate court granting the letters testamentary or of administration may require; with two or more sufficient sureties to be approved by the court upon sufficient evidence (see Form 147, and note following it), conditioned:

1. To make and return to the court, on oath, within three months, a true inventory of all the moneys, goods, chattels, rights, and credits of the testator, which are by law to be administered, and which shall have come to his possession or knowledge; and also, if required by the court, an inventory of the real estate of the deceased;

2. To administer, according to law and to the will of the testator, all his goods, chattels, rights, and credits, and the proceeds of all his real estate that may be sold for the payment of his debts or legacies, which shall at any time come to the possession of the executor, or to the possession of any other person for him; and,

3. To render, upon oath, a just and true account of his administration within eighteen months, and at any other times when required by the court or the law; and failing to do so for thirty days after he shall have been notified of the expiration of the time by the probate judge, he shall receive no allowance for his services unless the court shall enter upon its journal that such delay was necessary and reasonable.^a

If the person named executor of a will be also residuary legatee, and entitled to the remainder of the testator's estate after the payment of his debts and legacies, he may give bond to the satisfaction of the court¹ for the payment of such debts and legacies (131), and upon so doing will be excused from filing a bond as executor, as well as from returning an inventory and sale bill of the estate. But the giving of a bond by a residuary legatee will not release the real estate of the testator from the lien of creditors, except such portions of the same as may be sold by the executor to a person purchasing in good faith, and for a valuable consideration.^b

(1) See note appended to Form 147.

(a) §§ 5996, 6002.

(b) §§ 5998, 5999.

Should an executor be exempt by the will of the testator from giving an administration bond, it is discretionary with the probate court to respect the terms of the will, or to exact a bond before granting letters testamentary; and should such letters be granted without bond, the court may, at any subsequent time, upon application of any party interested, order the executor to file such bond, and upon his failing to do so, may remove him, and grant letters of administration with the will annexed to some other person.^a

Before giving bond and obtaining letters testamentary, an executor can not dispose of any portion of the estate of the testator, except to pay funeral expenses; nor can he previously, in any manner interfere with the estate, except to keep it in good preservation.^b

The executor of an executor has no authority, as such, to *administer the estate* of the first testator; but he must *render a final account* of such decedent's administration within six months after his appointment; and on the death of the sole or surviving executor of any last will, administration of the estate of the first testator, not already administered, may be granted, with the will annexed, to such person as the court shall think fit to appoint.^c

See also Section VI, p. 39.

As to an executor's or administrator's duty in relation to taxes,^d see p. 104.

SECTION II.

TO WHOM LETTERS OF ADMINISTRATION WILL BE GRANTED; WITH SUNDRY MATTERS RELATING SPECIALLY TO ADMINISTRATORS.

If the deceased left no valid will, his widow will be entitled to the administration of his estate, in preference to all other persons (7); although, if the court see fit, any of the next of kin of the deceased may be joined with her in the administration. Should the widow neglect or decline to take out letters, the next of kin of the deceased will be entitled to the administration, in the following order of precedence: 1. The children, if of full age. 2. The brothers and unmarried sisters.

(a) § 5996.

(b) § 6004.

(c) §§ 6003, 6175.

(d) §§ 2845, 2847, 2849, 2851.

3. The father ; and if he be dead, the mother, if unmarried. If the persons entitled to the administration are incompetent or evidently unsuited to discharge the trust ; or if they neglect, without sufficient cause, to take out letters, the court may commit the settlement of the estate to one or more of the principal creditors, if there be any competent and willing to administer. But should there be no such creditor, and should the estate exceed one hundred dollars in value, the court may grant letters of administration to any suitable person ^a (7).

Should the widow desire to renounce the administration, she may do so by appearing in person before the probate judge, or by sending in her written declination (3). Should she decline in writing, her signature should be attested by a competent witness, who must appear before the probate court and make oath that he saw the widow subscribe her name, and that she knew the contents of the instrument to which her name is attached.

It has become customary for courts, when a widow declines administering, to appoint the person recommended by her ; but there seems to be no legal sanction for this practice ; and, consequently, when a widow renounces the administration, it goes as of right to the next of kin of the decedent, if they are of full age and otherwise competent to administer.

If the persons entitled to the administration neglect to take out letters, the court may, if such persons be resident within the county, cite them to appear and accept or decline the trust (5) ; or they may be notified by any person interested in the estate to appear and make such election ^a (4).

Before letters of administration will issue upon the estate of a deceased person, the person applying for the same must make and file an affidavit (136) that there is not, to his knowledge, any last will and testament of the alleged intestate,^a and must give bond (9) to the State of Ohio, with at least two sufficient sureties (see Form, 147, and the note following it), in such sum as the court may direct (which is usually double the estimated value of the assets), conditioned—

1. To make and return into court, on oath, within three months, a true inventory of all the moneys, goods, chattels,

(a) § 6005.

rights, and credits of the deceased, which have or shall come to his possession or knowledge; and also, if required by the court, an inventory of the real estate of the deceased;

2. To administer according to law all the moneys, goods, chattels, rights, and credits of the deceased, and the proceeds of all his real estate that may be sold for the payment of his debts, which shall, at any time, come to the possession of the administrator, or to the possession of any other person for him;

3. To render upon oath a true account of his administration, within eighteen months, and at any other times when required by the court or the law, and failing so to do for thirty days after he shall have been notified of the expiration of the time by the probate judge, he shall receive no allowance for services, unless the court shall enter upon its journal that such delay was necessary and reasonable;

4. To pay any balance remaining in his hands, upon the settlement of his accounts, to such persons as the court or the law shall direct; and,

5. To deliver the letters of administration into court in case any will of the deceased shall be thereafter duly proved and allowed.^{1 a}

Upon the death of a person not a resident of this state, but interested as a partner or otherwise in business conducted here, and leaving property within the state wholly or in part belonging to him, the probate court of the county in which such business was carried on, or in which such property is situate, or in which any person indebted to the decedent may reside, is authorized and directed to grant administration (7) (10), of the estate of the decedent within this state, to any creditor (or other person) whose claim accrued here, upon his giving bond in like

(1) Where an estate has been fully settled, and all the moneys in the hands of the administrator have been paid over in pursuance of an order of court, should a will be discovered and proved subsequent to such settlement, the executor can not compel the former administrator to account for the money or property by him received and paid over. *Barkaloo's Adm'r v. Emerick et al.*, 18 Ohio, 268.

manner as other administrators¹ (9) (147). And it is by law provided that such administrator shall proceed to settle the estate according to the several acts in force relating to the settlement of the estate of persons dying within the state; and in case there be a surplus of assets, after the payment of all valid claims against the estate which have been presented to him, to pay the same into the court from which he derived his letters, for the benefit of the estate of the decedent, in the state in which he resided at the time of his death.^a

Letters of administration will not be granted, *as of right*, upon the estate of any deceased person, after the expiration of twenty years from his death, except to an administrator *de bonis non*; but the probate court may, for good cause shown by any person interested in the estate, grant *original* letters after the expiration of that period. Before granting such letters, the court may direct that notice of the application be given in one or more of the newspapers printed in the county, for any term not exceeding thirty days.^b

A man sentenced to the penitentiary for life is not civilly dead; and letters of administration will not be granted upon his estate.²

When a minor under guardianship dies, owning real estate against which there are claims, or owning goods and chattels or other personal estate, his guardian can not legally settle his estate, but an administrator must be appointed for that purpose.

(1) A creditor of any decedent non-resident, who owned lands in Ohio, has a right to take out letters on the estate; nor will the fact that there is a foreign will prevent this. Unless the will is produced, the probate court in the county where the lands are situated has the right, and is, upon application, bound to grant letters of administration. If the will is produced, the letters may be granted with the will annexed. *Bustard v. Dabney et al.*, 4 Ohio, 68.

(2) *Frazer v. Fulcher*, 17 Ohio, 260.

(a) § 6013.

(b) § 6014.

SECTION III.

**WHEN A SPECIAL ADMINISTRATOR MAY BE APPOINTED: HIS BOND,
POWERS AND DUTIES.**

When suit is brought to contest the validity of a will, or when for any other reason there is delay in granting letters testamentary or of administration, the court may, if it be deemed necessary, appoint a temporary administrator (24) (25), to take charge of the effects of the decedent until the appointment of an executor or administrator with general powers.^a

Such special administrator will be required to enter into a bond (26) to the State of Ohio, in such sum as the court may direct, with two or more sufficient sureties (see Form 147, and note following it), with condition—

1. That he will make and return into court, within three months, a true inventory (16) of all the moneys, goods, chattels, rights, and credits of the deceased, which have or shall come to his possession or knowledge; and,

2. That he will truly account, on oath, for all the moneys, goods, chattels, debts, and effects of the deceased that shall be received by him as such special administrator, whenever required by the court, and will deliver the same to the person who shall be appointed executor or administrator of the deceased, or to such other person as shall be lawfully authorized to receive the same.^b

A special administrator is required to collect all the goods, chattels, and debts of the deceased, and preserve the same for the executor or administrator who may thereafter be appointed, and for that purpose may commence and maintain suits as an administrator, and may also sell such perishable and other goods as the court may order to be sold, and no other.^c

His powers cease upon the appointment of an executor or administrator; and he is required to deliver to such executor or administrator all the goods, chattels, moneys, and effects of the decedent which have come into his hands; and upon failure or

(a) § 6007. •

(b) § 6008.

(c) § 6009.

refusal so to do, he may be compelled by citation (18) (19) and attachment (20) (21), as in other cases; and, in addition, his bond may be proceeded against to recover the value of the assets received by him.^a

Suits commenced by such special administrator do not abate when his powers cease; but the executor or administrator superseding him, may be admitted to prosecute such suits, as in the case of administrators *de bonis non*.^b

Such special administrator will not be liable to an action by any creditor of the deceased; and the time of limitation for all suits against the estate will begin to run from the time of granting letters testamentary or of administration in the usual form, in like manner as if such special administration had not been granted.^c

Such special administrator will be allowed such compensation for his services as the court may think reasonable, if he delivers over forthwith to the executor or administrator who may supersede him, the property and effects of the estate, as hereinafter provided.^d

SECTION IV.

THE GRANTING AND REVOCATION OF LETTERS, THE SURETIES, BOND RESIGNATION, REMOVAL AND DEATH OF EXECUTORS AND ADMINISTRATORS.

Upon the decease of any inhabitant of this state, letters testamentary, or letters of administration on his estate, must be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death; and when any person shall die intestate in any other state or country, leaving any estate to be administered within this state, administration thereof must be granted by the probate court of any county in which there is any estate to be administered; and the administration which shall be first lawfully granted, in the last mentioned case, will extend to all the estate of the deceased

(a) §§ 6010, 6011.

(b) § 6011.

(c) § 6012.

(d) § 6009.

within the state, and will exclude the jurisdiction of the probate court in every other county.^a

Any executor or administrator is removable (22) for failing or refusing to file an inventory, sale bill, or account of his administration within the time prescribed by law. Also for failing to give additional bond when his previous bond has, for any cause, become insufficient; for failing to indemnify his sureties when required to do so by the probate court; for absconding or concealing himself for the purpose of preventing the service of an order upon him; and also if he waste or unfaithfully administer the estate.^{1 b}

If an executor or administrator residing out of the state fail to file an account and settle the estate according to law, after having been duly notified (132) so to do by a party interested in the estate, or after citation (133) by the probate court; or if an executor or administrator become insane, or otherwise incapable of discharging his trust, or evidently unfit therefor, or it shall be made to appear to the court that he has unreasonably neglected to file an inventory of the estate, or has willfully omitted from the inventory any assets of the estate, or that there are unsettled claims or demands existing between him and the estate which in the opinion of the court may be the subject of controversy or litigation between him and the estate, or persons interested therein, the court may remove him; and if there be no co-executor or co-administrator to proceed with the administration, the court may issue letters of administration *de bonis non*

(1) An appeal will not lie from an order removing an administrator. Still's estate, 15 Ohio St. 484.

The question whether the removal of an executor is proper or not must be tried by writ of error, and not by appeal, and the decree of the court of common pleas in such a case will be utterly invalid. Where an executor was removed by the probate court, and, *on appeal* to the common pleas court, reinstated, and afterward collected money which he failed to pay over, his sureties were not liable, as the order of the probate court was never properly set aside. In such a case the jurisdiction of the common pleas to make the order may be collaterally inquired into. District Court, 1862. *Walker v. Walker's Ex'r*, 4 W. L. M. 32.

(a) § 5994.

(b) §§ 6049, 6050, 6087, 6178, 6206, 6207.

to some other person, as if such defaulting or incompetent executor or administrator were dead.^a

If, after granting letters of administration, as of an intestate estate, a will of the person deceased shall be duly proved and allowed, the first administration must be revoked (137) by the court. unless a petition contesting the probate of such will shall, before such revocation, be filed in the court of common pleas, in which case, in the discretion of the probate court, the administration may be continued in the hands of the original administrator, until the final determination of such proceedings to contest, when, if the will is sustained, the first determination must be revoked (137); and, in either case, upon the revocation of the first administration and the appointment of an executor or administrator with the will annexed, the executor or administrator with the will annexed, must be admitted to prosecute or defend any suit, proceeding, or matter commenced by or against the original administrator, in like manner as an administrator *de bonis non* is authorized to prosecute or defend a suit commenced by a former executor or administrator.^{1b}

The probate court may, at any time, for good cause shown, receive the resignation of an executor or administrator (23), and appoint an administrator in his place; but before accepting the same, should require such executor or administrator to render an account of his administration.^c

The acceptance of such resignation, and the appointment of another administrator, will not affect the liability of such former executor or administrator, or his sureties, for previous defaults or wrongful acts.^d

When any sole executor or administrator shall die without having fully administered the estate, the court must grant letters

(1) Where an estate has been fully settled, and all the moneys in the hands of the administrator have been paid over in pursuance of an order of court, should a will be discovered and proved subsequently to such settlement, the executor can not compel the former administrator to account for the money or property by him received and paid over. *Barkaloo's Adm'r v. Emerick et al.*, 18 Ohio, 268. See also *Bigelow v. Bigelow*, 4 Ohio, 138.

(a) § 6017.

(b) § 6019.

(c) § 6015.

(d) § 6016.

of administration, with the will annexed or otherwise, as the case may require, to some suitable person, to administer the goods and estate of the deceased, not already administered : provided, there be personal estate of the deceased not administered, to the amount of twenty dollars, or debts to a like amount remaining due from the estate.^a

When an unmarried woman, who is executrix, or administratrix, either alone or jointly with another person, shall marry, her husband will not be executor or administrator in her right, but the marriage will operate as an extinguishment of her authority¹ as executrix or administratrix : and the other executor or administrator, if there be any, may proceed in discharging the trust, as if she were dead ; and if there be no other executor or administrator, administration may be granted of the estate not already administered ; and such administrator may proceed to discharge the trust, in like manner as if the executrix or administratrix were dead.^b

A married woman can dispose of her property and appoint an executor by a will duly executed ; and if she die intestate, owning real estate, against which there are claims, or holding personal estate in her own right, an administrator may be appointed upon her estate in like manner as though she had died unmarried.^c

Where two or more persons are appointed executors, administrators, or testamentary trustees, the court may take a separate bond (8) (9), with sureties, from each of them, or a joint bond, with sureties, from all of them together ; and in all bonds with sureties, given by executors, administrators, or trustees, all the sureties must be inhabitants of this state, and such as the court shall approve (see Form 147, and note following it) ; and the bonds must be filed in the court taking the same.^d

(1) Proceedings to sell real estate to pay debts of the decedent, commenced by her, will not abate by her marriage. *Craig v. Fox et al.*, 16 Ohio, 563. See note 1, p. 58, and the text it relates to.

(a) § 6018.

(b) § 6022.

(c) §§ 5913, 5914, 5994, 5995, 3103.

(d) § 5999.

Such bond can not be claimed even after final settlement and distribution of the estate; but the same will and must remain perpetually on file in said court; and the sureties thereon will be held liable, even though no penal amount be stated in the bond at the time of signing.

Any surety of any executor or administrator, or the executor or administrator of any such surety, may, at any time, make application to the probate court to be released from the bond of such executor or administrator, by filing his written request (127) therefor with the judge of said court, and giving at least five days' notice (126), in writing, to such executor or administrator; and if such court upon the hearing is of opinion there is good reason therefor, the court must release such surety (128), and the death of a surety must always be deemed good cause; and if such executor or administrator fail to give new bond, as by such court directed, he must be removed (22), and his letters superseded; but such original surety will not be released until such executor or administrator so gives bond (8) (9); and such original surety will be liable only for the acts of such executor or administrator from the time of the execution of the original bond to the filing of the second bond; and the costs of such proceedings must be paid by the surety applying to be released, unless it appear to the court that the administrator or executor is insolvent, incompetent, or is wasting the assets of the estate.^{1a}

Whenever the sureties in any bond of an executor or administrator shall be insufficient, the court, on the petition of any person interested, and after notice (124) to the principal in the bond, may require (125) a new bond to be given, with two or more sufficient sureties; and when a new bond is thus required,

(1) This section was adopted in 1861 (see 68 Ohio L. 46, § 1), and has always been in force since then. A section, in words as follows, "Any surety in the bond of an executor or administrator may, at any time after the expiration of six years from the date of the bond, upon his petition, be discharged from all further responsibility upon such bond, if the court, after due notice to all persons interested, shall think it reasonable and proper to discharge him; and the principal shall thereupon give a new bond, with two or more sufficient sureties," passed in 1840, was in force from that time till 1880 (see S. & C. 567, § 192; 75 Ohio L. 904, § 215). It has been omitted from the codified laws as obsolete.

(a) § 6204.

the sureties in the prior bond will, nevertheless, be liable for all breaches of the condition committed before the new bond is approved by the court.^a

If, in the cases specified in the preceding paragraph, the principal does not give such bond within such time as shall be ordered by the court, he must be removed (22) from his trust;¹ and some other person may be appointed in his stead, as the circumstances of the case may require.^b

If any executor or administrator shall waste, or unfaithfully administer the estate, the court granting the letters may, if it thinks fit, on the application (127) of any surety in the administration bond, order (130) such executor or administrator to render an account, and to execute to such surety a bond of indemnity, with surety or sureties approved (see note, p. 316) by the court; and upon neglect or refusal to execute such bond of indemnity, within the time ordered by the court, it may remove him (22), and revoke his letters testamentary, or letters of administration, and appoint another administrator in his place.^c

All bonds of executors and administrators will bind and render liable thereon both principals and sureties, whether at the time of the signing and sealing by them, or any of them, the amount of such bonds be filled or left in blank, if such amounts be filled in before, or at the time of, the approval or acceptance of such bonds; and such filling in may be done in the absence of any or of all the obligors, without any express authority from any of them.^d

An administrator appointed in the stead of an executor or administrator who has died, resigned, or been removed, is entitled to all the assets of the estate remaining unadministered, and may maintain an action upon the bond of such previous executor or administrator for any breach of its conditions.^{2 e}

All lawful acts done by an executor or administrator, or of an

(1) See note 1, p. 53.

(2) O'Conner v. Ohio, 18 Ohio, 225; Tracy v. Card, 2 Ohio St. 431.

In McKoy v. Kercheval's Adm'r, 7 Ohio (pt. 1), 268, it was held that an administrator *de bonis non* could not bring suit upon a note given to his predecessor as administrator of the decedent, but the ruling of the court in that case is undoubtedly superseded by the provisions of the code.

(a) §§ 6205, 6206.

(b) § 6207.

(c) § 6208.

(d) § 6.

(e) § 6020.

administratrix before her powers as such cease by marriage, remain valid and effectual.^{1a}

The law provides that when an inquest is held upon the body of an unknown person, the probate court shall make such order for the preservation of the property found on such person, other than money, as may be necessary for the future identification of such person. The money found must be applied, first, to pay the expenses of saving the body of the deceased, and of the inquest and burial, and the remainder, if any, must be paid into the county treasury.^b

Any person entitled, as heir, legatee, or otherwise, to such funds, or any part of them, may make proof thereof to the probate court or county commissioners, who, upon being satisfied of the claimant's right, must certify the same to the county auditor, upon whose order the county treasurer must pay the money to the claimant.^b

The foregoing provisions of law will not preclude an executor or administrator, regularly appointed, from claiming any money or effects found upon the body of a deceased person at an inquest, whether before or after return made to the probate court.^c

SECTION V.

A FEW PLAIN DIRECTIONS TO PERSONS ABOUT TO APPLY FOR LETTERS TESTAMENTARY OR LETTERS OF ADMINISTRATION.

If the decedent left a will, and the person having it in custody be known, steps should be taken to have the same admitted to probate in accordance with the directions heretofore given.¹ But should it not be known in whose possession such will is, and the estate of the decedent is in such condition as to require immediate attention, application should at once be made to the pro-

(1) *Bigelow's Ex'rs v. Bigelow's Adm'rs*, 4 Ohio, 138; *Barkaloo's Adm'r v. Emerick et al.*, 18 Ohio, 268. See note 1, p. 55, and note 2, p. 59.

(2) Chapter I., pp. 23, 24.

(a) § 6021. But see 78 O. L., 9.

(c) § 1228.

(b) § 1227.

bate court (7), by the person or persons entitled to the administration according to law, for letters of administration (6), which letters (and the acts of the administrator in pursuance of the same) will be valid,^a until the discovery and probate of the will; after which such letters will be revoked,¹ and the authority of the administrator to bind the estate will cease (137).

But all legal acts done by him during the existence of his letters will remain valid and effectual.^{2 b}

Before applying for letters testamentary or letters of administration, the person intending to apply should make or procure to be made an estimate of the value of the property of the deceased likely to come into his hands.

The object of such estimate is to assist the probate judge in fixing the amount of administration bond; and although a strictly accurate valuation of the assets can not be made previous to the granting of letters, yet care should be taken to make it as nearly correct as circumstances will permit, in order to obviate the necessity of giving an additional bond, in case it should be found, upon return of the inventory, that the one already given is insufficient to secure the estate against loss from unfaithful administration.

Such estimate should include the goods, chattels, moneys, notes, book accounts, and all other personal property of the deceased, as well as any real estate ordered or authorized by will to be sold for the payment of debts and legacies; and in case the de-

(1) See note, 1, p. 53.

(2) The decisions of our courts have been, heretofore, in accordance with this section (§ 6019 in the new code); the discovery of a will, and the appointment of an executor, were held to operate as a repeal of the grant of administration, but did not avoid *mesne* acts. *Bigelow v. Bigelow*, 4 Ohio, 138.

Where an estate has been fully settled, and all the moneys in the hands of the administrator have been paid over in pursuance of an order of court, should a will be discovered and proved subsequently to such settlement, the executor can not compel the former administrator to account for the moneys or property by him received and paid over. *Barkaloo's Adm'r v. Emerick et al.*, 18 Ohio, 268.

(a) § 6019.

(b) 6021. But see 78 O. L. 9.

cedent died intestate, and it should appear from the outset that a sale of real estate will be necessary to pay his debts, the probable value of such real estate should also be included in the estimate.

The bond of an executor or administrator is usually fixed at double the estimated value of the assets to be administered; and as the approval of the sureties rests with the probate court, the person intending to apply for letters should select his bail and consult them before making his application, in order to avoid trouble and delay in obtaining letters.

The statute requires that there shall be at least two good sureties to each administration bond;^a and it is the practice of courts to receive none but freeholders, and such as are possessed of sufficient property, independent of debts and a homestead, to secure amply the penal sum named in the bond.

If the person intending to apply for administration be not a widow or next of kin of the decedent, the written declination of such widow (3) or next of kin (3), or both, as circumstances may require, should be procured before making the application.¹

Unless the applicant for letters be also residuary legatee, or unless it be provided by will that an appraisement of the personal estate of the testator shall not be made, the names of three suitable, disinterested persons should be selected, to be presented to the court for appointment as appraisers of such personal estate. Such appraisers need not be freeholders.^b

An appraisement of the personal estate of a decedent, should in all cases be made—even though his will should otherwise provide; and it is discretionary with the probate court to observe the direction of the testator in this respect, or to disregard it.^c Not infrequently the personal property of a testator is bequeathed to his widow for life; or it is so bequeathed subject to the payment of the testator's debts. In such cases it is sometimes supposed that an inventory and appraisement are

(1) See note, 1, p. 61.

(a) §§ 5996, 5997, 6001, 6002, 6006, 6008, 6150, 6151, 6169. See also Form 147, and note following it.

(b) § 6028.

(c) §§ 6023, 6028, 6074.

not necessary; but this may lead to great mischief. A widow may marry a second time, and have children; and she and her second husband may acquire property and mingle it with that belonging to the estate; or the widow may, without marrying a second time, acquire property in her own right, and mingle it with that bequeathed to her for life. Now, should no inventory be made, and should the property of the estate afterward be needed for the payment of debts, or should the widow die, and a separation of property become necessary, how can the executor or the heirs distinguish that which belongs to the estate from that which does not?

It may therefore be laid down as a general rule, admitting of but rare exceptions, that an inventory and appraisement of the estate must be made; and the executor or administrator should, accordingly, procure the appointment of appraisers for that purpose. No harm can in any event result from making such inventory; but should one be made, the advantage to be derived therefrom by the executor or administrator, and the widow and heirs, will, in every instance, well repay the trouble and expense of making the same.

Having thus provided himself with an estimate of the assets, the written declination of the widow or next of kin, or both (3), and the names of bondsmen and appraisers, the applicant may, at any reasonable hour, on any business day of the week, present himself in person or by attorney before the probate court of the county in which the deceased resided at the time of his death, and solicit letters (6). Unless there be a rule of the probate court requiring them to do so,¹ his sureties need not accompany him, as, in case letters should be granted, the probate judge will prepare a bond (8) (9), which the executor or administrator may take with him to procure the signature of his sureties, if desired. But neither letters testamentary nor letters of ad-

(1) Probate and other courts have the right to make such rules, not inconsistent with the laws of the state, concerning the manner in which the law shall be complied with as seems to them will best subserve the ends of justice and protect interests committed to their care. § 536. In Hamilton and some other counties, no such bond will be accepted unless the sureties personally appear before the probate judge or one of his deputies, and there sign the bond and make oath (147) as to its sufficiency.

ministration will issue until a sufficient bond, properly signed, is filed in the court; and until such letters do issue, an administrator can do nothing toward the settlement of the estate, and an executor only so much as is mentioned in Section I. of this Chapter.

SECTION VI.

NOTICE OF APPOINTMENT.

The first step taken by an executor or administrator, after obtaining letters, should be to give notice of his appointment¹ in some newspaper of general circulation in the county in which the decedent last resided (11). Such notice must be published for at least three successive weeks; and after such publication has taken place, a copy of such notice, with the affidavit of the executor or administrator, or of the printer or other person employed by him to give the notice, attached thereto, must be filed in the office of the probate judge of the county within one year from the date of the bond; and the notice, thus verified, becomes evidence of the time, place, and manner in which the same was given.^{2a} This affidavit may be the same in form as the one appended to Form No. 71, the number of weeks only being different.

Although such notice may be given at any time within three months from the date of the administration bond, yet a faithful executor or administrator will in this, as in all other matters coming within the scope of his duty, proceed as promptly and diligently as circumstances will permit.

(1) Such notice is good, although the fact of appointment is not expressly stated therein, and the notice consists merely of a demand, signed by the administrator as such, that all persons indebted to the estate, should make payment, and a notification to all persons holding claims against the estate to present them, etc. *Gilbert's Adm'r v. Little's Adm'r*, 2 Ohio St. 156.

(2) As to the manner of proceeding when there has been a failure to give this notice, see Chapter VI., Sec. I.

(a) §§ 6088, 6089.

CHAPTER III.

RELATING TO THE INVENTORY.

SECTION I.

PREPARATIONS FOR MAKING AN INVENTORY.

Every executor or administrator must, within three months after his appointment, make and return into court, upon oath, a true inventory (16) of all the goods, chattels, moneys, right, and credits of the deceased, which are by-law to be administered, and which shall have come to his possession or knowledge, unless he be residuary legatee, and give proper bond (131) to pay all debts and legacies.^a But even in that case the court may, at any time subsequent to the granting of letters, upon application of any person interested in the estate (34), make an order requiring that such inventory shall be made and returned (33).^b

If the court, at the time of granting letters testamentary or letters of administration, shall think fit, it may order the executor or administrator to also include in the inventory an appraisement of all the real estate of the deceased.^c

In a preceding section (pp. 60 and 61), the necessity of making an inventory in all cases was urged; and many considerations might here be presented for proceeding in this matter with all diligence. Let it, however, suffice to say that an executor or administrator can not make sale of the personal property of the decedent, nor convert the assets of his estate into money, until an inventory and appraisement have been made. And it may be added, as a further reason for dispatch, that if an executor or administrator unreasonably delay the making of an inventory, he will become personally liable for any loss to the estate in the

(a) § 6023.

(c) § 6025.

(b) §§ 6074, 6023, 6047.

waste, concealment, or embezzlement of the assets, in case the same should result from his negligence.^a

At least five days prior to the time fixed for the appraisement, a written notice¹(12) of the time and place of making such appraisement must be served upon the widow, heirs, and legatees of the decedent residing in the county in which the property is situate; and a like notice (13) must be posted up in at least two of the most public places within the township in which the decedent last dwelt.^b

Should one or more of the appraisers neglect or be unable to attend to the discharge of his or their duties, the probate judge of the county in which letters issued, or any justice of the peace of the county in which the property to be appraised is situate, may fill the vacancy or vacancies.^c The better practice is to have the appointment made by the probate judge.

When a justice appoints appraisers, he must make a certificate of the appointment, which must be in substance the same as Form 14. Such order must be filed by the executor or administrator, with the inventory, in the office of the probate judge of the county in which administration was granted.^d

In case any part of the personal estate is situate in any other county than the one from which letters issued, any disinterested justice of the peace of such other county may appoint the appraisers of such property.^e

For issuing an order to appraisers, a justice of the peace is entitled to a fee of forty cents.^f

Before proceeding to the discharge of their duties, the appraisers must take and *subscribe* an oath (15), before a probate judge, justice of the peace, notary public, or other officer authorized to administer oaths generally, that they will truly, honestly, and impartially appraise the estate and property which shall be exhibited to them, and perform the other duties required of them by law in the premises according to the best of their knowledge and ability.^g

(1) See note 53, p. 344.

(a) § 6209.

(d) § 6030.

(f) § 621.

(b) § 6032.

(e) § 6028.

(g) § 6033.

(c) § 6029.

This affidavit must be inserted in the inventory, or be written upon separate paper and attached thereto.^a

The appraisers are not bound to search for property; but merely to appraise that which may be presented to them by the executor or administrator.^a

The widow, heirs, legatees, and creditors of the deceased are entitled to be present at the making of the inventory, and can not be excluded by either the executor or administrator or the appraisers.^b

SECTION II.

INVENTORY OF THE PROPERTY EXEMPT FROM ADMINISTRATION, AND TO WHICH THE WIDOW AND CHILDREN ARE ENTITLED WITHOUT APPRAISEMENT.

After giving the notice mentioned in the preceding page, the executor or administrator shall, with the aid of the appraisers, if an appraisement is made, make the inventory herein directed.^c

The most judicious and systematic method of proceeding with the inventory is, in the first place, to set off to the widow of the decedent, and his children under fifteen years of age, if there be any, those articles which are by law exempt from administration (16). The following list comprises the articles so exempt:

1. One family sewing machine, to be retained by said widow absolutely as her own property, and all spinning-wheels, weaving looms, and stoves set up and kept in use by the family.

2. The family bible, family pictures, and school-books used by or in the family of the deceased, and books not exceeding one hundred dollars in value, which were kept and used as part of the family library before the decease of such person.

3. One cow, or if there be no cow, household goods, to be selected by the widow, or if there be no widow, by the guardian or next friend of such minor child, not exceeding forty dollars in value; or if there be no household goods such as the widow, or guardian, or next friend, may desire to select, then forty dol-

(a) § 6033.

(c) § 6031.

(b) § 6034.

lars in money ; all sheep to the number of twelve (their valuation not to be greater than seventy-five dollars), and the wool shorn from them, and the yarn and cloth manufactured by the family ; and all the flax in possession of the family intended for home use, and yarn or thread or cloth manufactured therefrom.

4. All the wearing apparel and ornaments of the family and of the deceased ; all the beds, bedsteads, and bedding, cooking utensils, and table-ware, necessary for the use of the family, one clock, one side-saddle, and any other articles of personal property not exceeding one hundred dollars in value, which the widow, or, if there be no widow, the guardian or next friend of such minor child or children, may select, to be valued by the appraisers.^a

Such of the foregoing articles as the decedent was possessed of at the time of his death, are to be entered, without appraisal, in a separate schedule (16), which must be signed by the appraisers ; but should any of the articles be wanting, the executor or administrator can not supply them by purchasing others ; nor can the appraiser set off other property of equal value in their stead.

The exemption of beds and stoves relates to such only as are put up and used by the *family* of the decedent, and will not include such as are required by tavern or boarding-house keepers in the prosecution of their business.

The widow of the decedent is entitled to the possession of all the property thus exempt, except the wearing apparel of the deceased, so long as she lives with and provides for his minor child or children ; but should she at any time fail to provide for them, she can retain out of the articles before enumerated only her own clothing and ornaments, one bedstead with the necessary bedding, and the sewing machine. The residue of such articles, if unconsumed and undisposed of, remain the property of such child or children.^b

If there be a widow and no minor child, the property so exempt will belong to her absolutely ;^b and, on the contrary, if there be minor children and no widow, the property will belong to them. And the widow and minor children are entitled to the

(a) § 6038.

(b) § 6039.

articles mentioned, even though the decedent left a will, and ample provision should be therein made for them.

SECTION III.

THE ALLOWANCE TO THE WIDOW AND CHILDREN FOR ONE YEAR'S SUPPORT.

The appraisers should next proceed to set off to the widow of the decedent and to his children under fifteen years of age, or to the widow or children, as the case may be, provisions or other suitable property sufficient for their support for one year from the time of his death (16).^a

No definite or invariable rule for determining the amount of such allowance can be prescribed; but it may be proper to remark that such allowance should be made with reference to the actual condition of the family—their ages, health, social standing, and previous manner of living—rather than to the amount of the assets or to the solvency or insolvency of the estate. The widow and children are entitled to a liberal allowance for their support, if it should consume the entire estate except what may be necessary for the payment of the expenses of the last sickness and funeral of the decedent, and the costs of administering his estate; and this, even though they should be amply provided for by the will of the decedent, unless the will specially state that such provision is made in lieu of the statutory allowance for their support.^{1b}

(1) In *Dorah's Adm'r v. Dorah's Ex'r*, 4 Ohio St. 292, it was held that where a widow, to whom an allowance has been made under the statute, for her support, dies before the money allowed her has been paid over by the executor or administrator, *her* administrator is entitled to the portion so unconsumed, and may maintain an action against the executor or administrator of the husband to recover the same. Whether the probate court could intervene and reduce the allowance, after the death of the widow, is left an open question by the court, in deciding the case referred to.

In equity, it would seem that unless the portion of such allowance remaining unconsumed should be needed for the payment of the debts of the

(a) § 6040.

(b) § 5964.

The necessary expenses of a family will include boarding, clothing, education, medical attendance, fuel, lights, house rent (except when the widow remains in the mansion-house¹ of her deceased husband for one year, by permission of law), and such other items of expenditure as the peculiar wants of families, growing out of their place of residence, condition, and circumstances may demand.

A separate schedule (16) of the property set off for the support of the widow and children must be made and signed by the appraisers; and in order to arrive at the total value of such property, an appraisement of the several articles should be made and entered in the schedule.^a

Should there not be sufficient property of a suitable kind to set off, it is the duty of the appraisers to certify what sum in

widow, the probate court should interpose and reduce the allowance to the amount actually paid over by the executor or administrator, and consumed. The allowance is strictly *personal*, and is intended for the benefit of those only in whose favor it is made; and as creditors are not infrequently cut off from receiving any portion of their claims by reason of the entire estate being devoted to the support of the widow, great injustice would result if the money thus taken from creditors should, upon the death of the widow, go to her heirs, instead of reverting to the estate of the husband, for the benefit of his creditors. But see *Bane v. Wick*, 14 Ohio St. 505.

The year's allowance of the widow and minor children is a lien on the land fraudulently conveyed by decedent during his life. *Allen v. Allen's Adm'r*, 18 Ohio St. 234.

It seems that a widow who is in debt to the estate for articles purchased from it, and who has not given lawful security therefor, could not compel payment of a balance due on her year's allowance. *White v. Moe*, 19 Ohio St. 37, 42.

The widow's allowance for one year's support may be reviewed for the benefit of the estate of the widow by the probate court, although the petition for such review be not filed till after the end of the year and the death of the widow.

A person with whom she lived, and who supported her during this year, is a proper person to file such petition. *Sherman's Ex'r v. Sherman's Adm'r*, 21 Ohio St. 631. See last part of note 1, p. 38, and notes 52, 53, p. 344.

(1) The widow may either remain in the mansion-house, or she may rent it for her benefit; and if the administrator should rent it, she can recover the rent money from him by suit.

(a) § 6042.

money should be added to make such allowance sufficient for the support of the widow and children for one year.^a

Any provisions or other property consumed by the widow or children previous to the appraisement must be considered by the appraisers in fixing the allowance.^b

The allowance so made to the widow and children, or either, may be reviewed^c by the probate court, upon petition of the widow, or any heir, legatee, creditor, or other person interested in the estate of the decedent, and may be increased or diminished at the discretion of the court (134) (135).^e

SECTION IV.

PERSONAL PROPERTY HELD BY THE WIDOW IN HER OWN RIGHT.

The appraisers should next make a list (16) of such articles of furniture and household goods as the wife brought with her at her marriage, or which came to her by bequest or gift subsequently, or which, after her marriage, were purchased with her own separate money or property.^d

This list should also include any rights in action that may be found, belonging to the wife at the time of her marriage, or which she received by gift, bequest, or inheritance, or as the wages of her separate labor, or as damages for a violation of her personal rights, after marriage. These, with the articles of property before mentioned, can not be subjected to the payment of the husband's debts, unless such property was owned and held by the wife prior to July 4, 1846, and the debts also existed before that date.^e

SECTION V.

INVENTORY OF THE PROPERTY SUBJECT TO APPRAISEMENT.

The next duty of the appraisers is to make appraisement of

(1) See note 53, p. 344.

(a) § 6041.

(b) § 6040.

(c) § 6043.

(d) § 3108.

(e) § 3109.

the residue of the personal estate¹ of the decedent (16),^a and the real estate, if the order of the court be to appraise this also.^b

And in appraising the goods and chattels, the appraisers are required by law to set down each item or article separately, with the value of the same in dollars and cents, placed opposite thereto.^a

The object of this regulation evidently is to make a comparison between the articles mentioned in the inventory and those in the sale bill convenient and easy; but the appraisers are not thereby precluded from appraising by the quantity, or in gross, such property as can not without great labor and inconvenience be appraised and entered in the inventory separately; as, for example: threshed grain, potatoes, poultry, earthen pots, etc. — all of which may be appraised in such quantities as may be most convenient to the appraisers, and may subsequently be sold in lots or separately, as the executor or administrator may deem best for the interests of the estate.

The inventory must contain a particular statement of all bonds, mortgages, notes,² and all other securities for the payment of money, belonging to the deceased, which are known to such executor or administrator, specifying the name of the debtor in each security, the date, the sum originally payable,

(1) An intestate having at his decease left contracts in force for building a dwelling-house, and other improvements, which he had commenced and was carrying on at the time of his death, designed as a residence for himself and not for the object of improving the real estate as an investment, and it appearing that the completion of such improvements would result in loss to the estate, it was held that the materials prepared for the building should be regarded as personal, and not as real assets, and that the administrator might rescind the contracts for making the improvements. *Gray et al. v. Hawkins' Adm'x et al.*, 8 Ohio St. 449. But see rights of contractors under Mechanics' Lien Law (Chapter XIV., Section II.), passed since this decision.

An administrator can not maintain an action of trover to recover goods transferred by his intestate to defraud creditors. *Benjamin v. Le Barron's Adm'r*, 15 Ohio, 517. But this is doubted and explained in *Kilbourne v. Fay*, 29 Ohio St. 264, 280.

(2) Notes delivered to an executor to indemnify the estate against the liability of the testator as surety, are not assets of the estate; nor is the money collected on them. *Arbuckle's Ex'rs v. Tracy's Adm'rs*, 15 Ohio, 432.

(a) § 6034.

(b) § 6025.

the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, can be collected on each claim.^a

The inventory must also contain a statement of all other debts and accounts belonging to the deceased, which are known to such executor or administrator, specifying the name of the debtor, the date, the balance or thing due, and the value or sum which can be collected thereon, in the judgment of the appraisers.^b

The inventory must also contain an account of all moneys, whether in specie or bank bills, or other circulating medium, belonging to the deceased, which shall have come to the hands of the executor or administrator; and if none shall have come to his hands, the fact shall be so stated in said inventory.^c

The debts and accounts above mentioned include all claims not in writing as well as book accounts, etc., whether due to the decedent or to become due. To avoid confusion the good claims should be entered in the inventory together, and the doubtful and bad should follow in separate lists, and under appropriate headings.

Advancements made by the deceased during his lifetime to his children or heirs, whether evidenced by notes, receipts, or book accounts, are not assets in the hands of the executor or administrator, and have properly no place in the inventory.^d

When a testator by will releases any claim he may hold against his executor or any other person, such claim must nevertheless be included in the inventory, and be appraised, as such release is not valid as against the creditors of the testator. But should the amount of such claim not be required to satisfy the testator's debts, the release will be good, and such claim will not be deemed assets in the hands of the executor or administrator.^d

Naming a person executor of a will does not extinguish his indebtedness to the estate of the testator, but the claim against him must be included in the inventory, and when it becomes

(1) See, as to advancements, pp. 173 174.

(a) § 6035.

(c) § 6037.

(b) § 6036.

(d) § 6068.

due the executor will be liable for the same as for so much money received; and he is required to distribute the amount due in like manner as the proceeds of other claims due the estate.^{1 2a}

When any mortgagee of real estate, or any assignee of such mortgagee, shall die without having foreclosed the right of redemption, the mortgaged premises, and the debt secured thereby, shall be considered as personal assets, in the hands of his executor or administrator, and shall be administered and accounted for as such.^b

Any claims for money due the widow in her own right, and which the husband, in his lifetime, had not so reduced into his own possession, as by the rules of law to be entitled thereto by his marital rights, remain the property of the widow, and should not be included in the inventory.^{3 c}

(1) The same rule of law prevails in the case of administrators. *Bigelow's Ex'r v. Bigelow's Adm'r*, 4 Ohio, 138; *Collard's Adm'r v. Donaldson et al.*, 17 Ohio, 264; *Tracy's Adm'r v. Card's Adm'r*, 2 Ohio St. 431; *Hall v. Pratt*, 5 Ohio, 72; *Blizzard v. Filler*, 20 Ohio, 479; *Raab's Estate*, 16 Ohio St. 273.

(2) Where the testator holds a mortgage against the person he has named executor of his will, to secure the payment of a debt, the mortgage is not extinguished by the operation of law which renders such indebtedness, when the same becomes due, assets in the hands of the executor; but the mortgage remains an incumbrance on the lands of the executor; and an administrator *de bonis non* may foreclose the mortgage in case the executor should not have accounted for and distributed among the heirs or creditors of the testator the amount of such debt. In such case the persons interested in the estate are not compelled to rely solely upon the administration bond. *Collard's Adm'r v. Donaldson et al.*, 17 Ohio, 264.

(3) The wife's contingent right by survivorship to her choses in action immediately reducible into possession, may be barred by settlement before or after marriage, by actual reduction into possession by the husband, or certain acts held to be equivalent to actual reduction into possession, such as recovery of judgment or decree in the sole name of the husband, the taking of a note or obligation for the debt in the sole name of the husband, by assignment by the husband for a valuable consideration, or by release. *Needles' Ex'r v. Needles et al.*, 7 Ohio St. 432. See also *Dixon's Adm'r v. Dixon et al.*, 18 Ohio, 113. Choses in action, belonging to the wife at the

(a) § 6069.

(c) § 3108.

(b) § 6070. (Sec p. 90, for rest of section.)

Shares of stock in any railroad or other incorporated company, are personal estate, and subject to appraisement and sale.¹

A lease for years, held by the decedent in the real estate of another, is also assets in the hands of the executor or administrator; and should be appraised and sold like other personal estate. But a permanent leasehold, renewable forever, is not subject to administration as personal estate, but descends to the heirs of the decedent in like manner as real estate,² unless required for the payment of debts; in which case a petition must be filed in the probate court, by the executor or administrator, and an order of sale obtained, as in the case of real estate, the absolute title to which is actually in the decedent.

Personal estate, such as stocks, bonds, notes, etc., held by the decedent as trustee, should not be included in the inventory; or, if included, should not be appraised.³

The emblements or annual crops raised by labor, whether cut or still standing at the time of the death of the decedent, are assets, and must be appraised. Grass, while growing, is not assets; but, when cut, the case is different, and it is then subject to administration. So also with fruit; while upon the trees it is

time of the marriage, and not reduced to possession by the husband during coverture, will go to her representatives charged with her debts *dum sola*. Promissory notes payable to the wife or bearer *dum sola*, and remaining in possession of the husband during coverture, without being assigned, or judgment being taken thereon, will, at the death of the wife, fall to her heirs. *Dixon's Adm'r v. Dixon et al.*, 18 Ohio, 113.

(1) *Johns v. Johns et al.*, 1 Ohio St. 350. As to sale, see *post*, p. 83.

(2) *Loring v. Melendy et al.*, 11 Ohio, 355; *Northern Bank of Kentucky v. Roosa et al.*, 13 Ohio, 334.

(3) Where a testator, at the time of his death, held certain bonds in personal trust for the sole benefit of others, and was in no default as to the duties of his trust, and said bonds were afterward collected by his executor, with the knowledge and apparent acquiescence of the beneficiaries, and the proceeds were not paid to the parties entitled thereto under the trust: *Held*, that the trust funds were not assets of the estate of the testator, and therefore an action could not be maintained by one of the beneficiaries against the sureties in the executor's bond for a misappropriation of the trust funds so collected. *Quinby v. Walker et al.*, 14 Ohio St. 193. See also *Arbuckle v. Tracy*, 15 Ohio, 432.

considered a part of the real estate, but, when taken off, it becomes personalty.

Wood cut down for sale or use, and trees in a nursery, are assets, and must be appraised and sold.

The executor or administrator, or the person to whom he may sell such emblements, may, at all reasonable times, enter upon the lands to cultivate, sever, and gather the same.^a

Money and other effects found on the body of an unknown decedent are assets, and must be drawn out of the county treasury, if there deposited.^b (See p. 58.)

In some cases, machinery, steam engines, and other property of a like character, are fixtures, and pertain to the realty; in others, they are personal estate and subject to administration. It is impossible to prescribe an infallible rule by which the class to which such property belongs may, in all cases, be determined, and, therefore, an endeavor to do so here would be useless. The best course that can be pursued by an executor or administrator, with reference to such property, is to consult a competent attorney, and obtain an opinion as to which class of estates, real or personal, the particular property in question belongs.

An executor or administrator has, by law, no control over property in which the decedent had an interest as partner only; but should the surviving partner or partners fail to cause an inventory of the partnership assets¹ and liabilities to be made, within thirty days from the death of the deceased partner, it becomes the duty of his executor or administrator to cause such inventory to be made, by the oaths of three appraisers specially appointed by the probate judge, and forthwith to deposit such inventory in the probate court, to be filed, but not recorded.

(1) Real estate purchased for partnership purposes, paid for with partnership funds, and actually used in the partnership business, should be regarded as partnership assets, within the meaning and operation of the law. But real estate not needed or used for the partnership purposes, though paid for with partnership means, is not assets of the firm, within the meaning of this act, notwithstanding the rents and profits thereof be applied to partnership uses. *Rammelsberg v. Mitchell et al.*, 29 Ohio St. 22.

The good will of the partnership, though not a distinct item of assets, should be considered as an element of value in the appraisalment of the tangible property. *Ib.*

(a) § 6027.

(b) §§ 1227, 1228.

The surviving partner or partners, with the consent of the executor or administrator and the approval of the probate judge, may take the partnership assets¹ at their appraised value, upon giving the executor or administrator a bond and note, with good security—the note for the payment of the interest of the deceased in the assets, in nine months from the time when the same are so taken, and the bond conditioned for the payment of the partnership debts.^{2a}

If any real estate is so appraised and elected to be taken, the probate court must order that, upon full payment of the notes, the administrator or executor shall execute and deliver to the purchaser his deed for the deceased partner's interest therein, and such conveyance will pass the title thereto.^b

The appraisers are entitled to be paid one dollar per day.^c

SECTION VI.

RETURN OF INVENTORY; EXCEPTIONS THERETO; HOW ENFORCED.

The inventory being completed, it must be signed by the appraisers; the executor or administrator must retain a copy of it, and must file the original inventory in the office of the probate judge of the county.^d This should all be done without delay. By the "original" inventory is not meant the rough notes usually made by the person acting as appraisers' clerk, which are necessarily informal and unfit for filing, but the first inventory which the appraisers sign.

Upon returning the inventory, the executor or administrator will be required to make and subscribe an oath (17) that the same is in all respects just and true; that it contains a correct

(1) When the good will was not considered in the appraisement, the surviving partner, who, after his election to take the assets, appropriates it to his own use by continuing the business, may be compelled to account for its value to the estate of the deceased partner. *Rammelsberg v. Mitchell et al.*, 29 Ohio St. 22.

(2) For decisions relating to this matter, see *Merrick v. Boury & Sons*, 4 Ohio St. 60; *Wilson v. Stillwell*, 14 Ohio St. 464; *Leach v. Church*, 15 Ohio St. 169; *Myers v. Standart*, 11 Ohio St. 29; *Wilson v. Forder*, 20 Ohio St. 89; *Feigley v. Whitaker*, 22 Ohio St. 606; *Corwin v. Suydam*, 24 Ohio St. 209.

(a) §§ 3167, 3168, 3169.

(b) § 3170.

(c) § 1300,

(d) § 6044.

statement of all the estate and property of the deceased, being assets, that has come to his knowledge; and particularly, of all money bank bills, or other circulating medium belonging to the deceased; and of all just claims of the deceased against such executor or administrator, or other persons, according to the best of his knowledge. This oath must be indorsed upon or attached to the inventory, and may be made before the probate judge or his deputy, or before any other officer authorized to administer oaths required by law.^a Formerly, it had to be made before the probate judge or his deputy, except only when they were absent from the county, or incapable, from sickness or other cause, of transacting business.^b

If an executor or administrator refuse or neglect to return an inventory within three months from the date of his letters, it is the duty of the probate judge of the county, upon the application (18) of any person interested in the estate, to issue an order (19) requiring the person so in default, within some short period named in the writ, to make return of an inventory according to law or to appear and show cause why an attachment should not issue against him for his default.^c

The order may be served by a sheriff, constable, or any other person; and upon return being made that the executor or administrator was served by delivering him a correct copy of such writ, and upon his failure to file an inventory within the time limited by the writ, or to appear and show good reason for such failure, the probate judge is directed by law to issue an attachment (20) (21) against him, and to commit him to the jail of the county until he returns such inventory, or is discharged by the order of the probate judge.^d

If the executor or administrator should abscond or secrete himself, so that personal service of an order can not be made upon him; or if, after being committed to prison, he should fail to return an inventory within thirty days, the probate court may revoke¹ his letters (22), and grant administration to the person

(1) See note 1, page 53.

(a) § 6046, as am. 79 O. L. 27.

(b) § 6046.

(c) § 6047.

(d) § 6048.

next entitled thereto after such delinquent executor or administrator, as in cases of original administration.^a

By the revocation of his letters such executor or administrator is deprived of all power and control over the estate of the decedent; and suit may be brought upon his bond to recover for any injury sustained by the estate by reason of his default or wrongful acts, and to the full value of all the property received by him belonging to the estate of the decedent and not duly administered.^b

If an executor or administrator be committed to jail for default in filing an inventory, the probate court may discharge him from custody upon his delivering, on oath, all the property of the deceased under his control to such person as the court may authorize to receive the same.^c

Should further assets of the estate be discovered after the making of the inventory, it is the duty of the executor or administrator to call the appraisers together and cause the same to be appraised (16); and to make return of such supplemental inventory and appraisement within two months from the time of discovering such additional property.^d

The making and return of such inventory may be enforced in like manner as in the case of the first inventory.^d

It is, however, frequently the case that a few articles, not warranting the expense of a further appraisement, are discovered either before or on the day of sale. In such cases it will in general be deemed sufficient if such articles are entered, under some distinctive title, in the sale bill, and the fact mentioned to the probate judge when the sale bill is returned.

Should the property newly discovered consist of money, notes, or book accounts, of small value or amount, it may be sufficient to account for the same upon final settlement with the court. In cases of doubt the probate judge may be consulted, who in this, as in all other matters connected with the settlement of estates, possesses large discretionary powers; and if, in his opinion, the property so discovered is too trifling in value to warrant the trouble and expense of an additional inventory, the executor or administrator may be governed accordingly.

(a) § 6049.

(c) § 6052.

(b) §§ 6050, 6051.

(d) § 6061.

At any time within one year after the return of any inventory, any person interested in the estate may file exceptions to it. The court must then set a day for the hearing thereof, and cause written notice of such filing and of the time so fixed for the hearing, to be given to the executor or administrator, not less than five days before the time so fixed. For good cause, the hearing may be continued for such time as the court deems reasonable. At the hearing, the executor or administrator, and any witnesses subpoenaed by either party, may be examined under oath. The court must enter its finding on the journal, and tax the costs as may be equitable. An appeal may be taken to the common pleas court, by either party, from any finding, order, judgment, or decision, of the probate court on such hearing, as in other cases.^a

SECTION VII.

PROCEEDINGS AGAINST PERSONS SUSPECTED OF HAVING CONCEALED OR EMBEZZLED ASSETS.

Should an executor or administrator, or any heir, devisee, legatee, creditor, or other person interested in the estate of a deceased person, have good cause to suspect that any person has concealed, embezzled, or carried away any moneys, goods, chattels, claims, or other effects of such estate, he or they may make complaint (27) before the probate court of the county, whose duty it thereupon becomes to cite (28) the person or persons so suspected to appear forthwith before it, and to be examined on oath or affirmation touching the matter complained of.^b

Upon failure or refusal of the person so cited to appear, or, having appeared, to submit to an examination under oath, and answer such interrogatories as may lawfully be propounded, it is the duty of the court to order (29) such refractory person into close custody in the jail of the county, there to remain until he or she shall submit to the order and direction of the court.^c

After the examination of the party complained of, the probate court is directed by law to examine, under oath, such other persons as may be offered as witnesses by either party to the proceeding. The examination (30), whether of the person sus-

(a) § 6024, as am. 80 O. L. 67.

(b) § 6053.

(c) § 6054.

pected or of the witnesses, including both questions and answers, must be reduced to writing by some competent person, and after having been signed by the persons respectively, must be filed away by the court.^a

Should the probate court, upon such examination, be satisfied that the person complained of has been guilty of concealing, embezzling, or conveying away any moneys, goods, claims, or other property or effects of the deceased, it is imperative upon the court forthwith to render judgment (31) against the person so found guilty, and in favor of the executor or administrator of the estate, or in favor of the State of Ohio, for the use of the estate of the decedent, if there be no executor or administrator within the state, for the amount of the moneys, or value of the goods or other property so concealed, embezzled, or carried away, with ten per centum penalty thereon, and for the costs of the proceeding.¹ Such judgment becomes a lien upon the real estate of the person against whom the same is rendered, within the county, from the date of its rendition.^b

An appeal may be taken from the judgment of the probate court, to the court of common pleas, in such cases.²

In case such judgment should not be paid, and it should become necessary to resort to compulsory measures to enforce the payment of the same, the executor or administrator must obtain from the probate judge a certified transcript of the judgment, and file the same in the office of the clerk of the court of common pleas of the county; and it is the duty of the clerk to issue immediately an execution, as in other cases, for the amount of the original judgment and costs, and the costs which have accrued since the rendition of the judgment. After the issuing of such execution, all proceedings thereunder must be conducted

(1) The court has no constitutional power to render judgment against the party charged in such cases, except for such property and effects as he, on his examination, admits himself guilty of having embezzled, concealed, or carried away; and to the extent that the statute professes to authorize a judgment in cases where there is a controversy between the parties, it is unconstitutional. *Howell v. Howell's Adm'r*, 19 Ohio St. 556.

(2) As to manner of taking appeal, see Chapter XIV., Section I.

(a) §§ 6055, 6056.

(b) § 6057.

as if the judgment had been rendered in the court of common pleas.^a

If judgment be rendered in the name of the state, and there be no executor or administrator within this state, it is the duty of the prosecuting attorney of the county to procure and file the transcript before mentioned, and if the money be collected by execution, to pay the same into the county treasury, for the use of the estate—reserving out of the money such sum as the probate judge may allow him for his services in transacting the business.^b

It is provided by law that all “gifts, grants, or conveyances of lands, tenements, hereditaments, rents, goods, or chattels, and all bonds, judgments, or executions made or obtained with intent to avoid the purposes of these proceedings, or in contemplation of any such examination or complaint as aforesaid, shall be utterly void and of no effect.”^c

(a) § 6058.

(c) § 6060.

(b) § 6059.

CHAPTER IV

RELATING TO THE SALE OF PERSONAL PROPERTY.

SECTION I.

WHEN AND IN WHAT MANNER SALE MUST BE MADE, AND A SALE BILL RETURNED; AND HOW SUCH RETURN MAY BE ENFORCED.

Unless specially exempt by will, or unless the person administering the estate be also residuary legatee, every executor or administrator must, within three months after the date of his bond, sell the whole of the personal property belonging to the estate, which is liable to the payment of debts, and is assets in his hands, to be administered, except promissory notes, and all claims, demands, and rights in action which can be collected by him, and except bonds and stocks when the sale of them is not necessary for the payment of debts; and, also, except the following:

First. Such as the widow may desire to take at the valuation made by the appraisers, she securing payment to the executor or administrator therefor, as other purchasers.¹

Second. Such property as is specifically bequeathed can not be sold until the residue of the personal estate has been sold, and is found by the executor or administrator to be insufficient for the payment of the debts of the estate.

Third. The executor or administrator may defer the sale of the emblements or annual crops raised by labor, which were not

(1) The right of the widow to take personal property at the appraisement is not limited to the time of making the appraisement, but may be exercised at any time before the property is put up for sale, within the three months allowed to the administrator for selling the property; and her right is not affected by the changes that may, in the meantime, have taken place in the market value of the property. *Overturf v. Wear*, 26 Ohio St. 538.

severed from the land of the deceased, at the time of his death, beyond the three months prescribed for the sale of the assets; and the same may be sold before or after they are severed from the land, at the discretion of the executor or administrator, and in the mode prescribed for the sale of other goods and chattels.*

When by the terms of any last will the testator shall express a wish that there be no appraisement or sale of his personal property, the court admitting the will to probate may, at its discretion, direct the omission of either or both of said requirements; and may, also, at any subsequent period, upon the application (34) of any party interested, require such appraisement and sale (33), or either of them, as the justice of the case may require.^a

The property specifically bequeathed may be delivered over to the legatee entitled thereto, he securing the redelivery (32) thereof, on demand, to the executor or administrator; otherwise the same shall remain in the hands of the executor or administrator, to be distributed or sold, as may be required by law, and the condition of the estate.^b

In case the personal estate of the decedent which is not bequeathed should be insufficient to satisfy his debts, the property so bequeathed will become assets in the hands of the executor or administrator, and must be sold, unless the testator should otherwise have provided for the payment of his debts; in which case the directions of the will must be followed, and the debts paid in accordance therewith.^c

The sale of personal property shall be made at public vendue, after at least fifteen days' notice having been given in some newspaper in general circulation throughout the county, or by advertisement, set up in at least five public places in the county where such sale is to take place.^d The letter and spirit of the law will be fulfilled if the notice be posted in five public places in the vicinity of the place of sale.

But for good cause shown (119), the probate court may extend (121) the time for making sale, or may authorize an executor or

(a) § 6074

(b) § 6075.

(c) §§ 5974, 5975.

(d) § 6076.

administrator to sell any part of the personal estate not taken by the widow at the appraisement, at private sale (121), either for cash or upon such other terms as the court, in its discretion, may direct (121). But property can not be sold at private sale for less than its appraised value, unless the probate court be satisfied, by the affidavit (120) of at least three disinterested persons, that such property can not be sold for its appraised value, and that it will be for the best interests of the estate to sell at a less rate, in which case the court may authorize the executor or administrator to sell such property at a reduced price. If not sold at private sale within six months from the time of making such order, or within such other time as may be fixed in the order, the court may direct that such property be sold at public sale, as in other cases.^a

Such notice should mention the time, place, and terms of sale, and should contain a brief description of the leading articles to be sold (35).^d

An executor or administrator may sell, either at public or private sale, any railroad or other stocks which may have come into his hands by virtue of his office; but if sold at private sale, a price must be fixed by the probate court, at less than which it can not be sold.^b

A list (36) of the articles subject to sale, in the order in which they stand in the inventory, must be prepared by the executor or administrator previous to the day of sale; and at the time of the sale the clerk (who must be a person not interested in the estate) must place opposite to each article or item in such list the name of the purchaser or purchasers, and the amount for which the same or any part thereof may be sold. Should any articles be taken by the widow at the appraisement, or should any remain unsold for want of bidders or any other cause, the clerk must note in such list, opposite to such articles: "Taken by the widow at the appraisement;" or, "unsold for want of bidders;" or otherwise, as the case may be.^c

When, as is frequently the case, property is discovered on the day of sale which has not been inventoried or appraised, the

(a) § 6076.

(b) § 6080.

(c) § 6084.

same should be entered in a separate list at the end of the sale bill, and designated as: "Property not inventoried;" or "property not mentioned in the inventory," or by some other pertinent title.^a

In making sale the articles may be offered in such order, and in such quantities, as may seem best to the executor or administrator, without reference to the method observed in making the inventory; but in the sale bill care must be taken to arrange the property in the order in which it stands in the inventory, for the convenience of those who may desire to compare the sale bill with the inventory.^b

A credit of not less than three nor more than nine months must be given to persons purchasing to an amount exceeding three dollars; and notes (38) or bonds, with at least two sufficient sureties, must be taken for all those who purchase on time. Great care is necessary in taking security, in order to exonerate the executor or administrator from liability in case of failure to collect the amount due upon any of the sale notes. Only by rigidly observing the requirements of the law, and receiving none but bail of undoubted solvency, will he be entitled to credit in his account for sale notes remaining in his hands uncollected and uncollectable.^{1 c}

It is not necessary to specify in the sale bill whether money or notes were received from the several purchasers.

It is a well settled principle of law that an executor or administrator can not purchase property sold by himself as such; and that he acted in good faith and paid full value for such property will make no difference.² But such purchase, if ratified by all parties in interest, would then be valid.

The sale bill being completed, the same must be signed by the

(1) There is no doubt that an administrator, in disposing of the assets of the estate, without proper security for payment, was guilty of a breach of official duty, and for any damage or loss thereby occasioned to the estate under a proper administration of its assets by the administrator *de bonis non*, the prior administrator and his sureties would be liable. *White, Adm'r v. Moe et al.*, 19 Ohio St. 37, 41.

(2) For numerous decisions sustaining this statement, see notes, p. 150.

(a) § 6084.

(b) § 6085.

(c) §§ 6081, 6082, 6088.

clerk, and within six weeks from the day of sale returned by the executor or administrator into the office of the probate judge of the county in which letters were granted.^a Should the first draft of the sale bill be rough, and in the opinion of the executor or administrator unfit for filing, the same may be copied, and such copy, being signed by the clerk, will be to all intents and purposes an original sale bill, and may be filed as such.

Before filing the sale bill the executor or administrator must make oath before the probate judge or some other officer authorized to administer oaths generally, that the same is in all respects correct, according to the best of his knowledge and belief; and a certificate of such oath must be indorsed upon or attached to such a sale bill (37).^a✓

The executor or administrator should not fail to retain a copy of the sale bill, as he will have frequent use for it; and after the original has been filed, it will be very inconvenient calling at the office of the probate judge each time that it may be necessary to refer to the same.

Should the executor or administrator fail to return a sale bill within six weeks from the day of sale, the same compulsory measures may be resorted to, and he and his sureties will be liable for any damage or loss resulting from his negligence, as in the case of his failure to return an inventory (18)(19)(20)(21)(22).^b

(a) § 6086.

(b) § 6087.

CHAPTER V.

RELATING TO THE COLLECTION OF CLAIMS, AND THE
BRINGING OF SUITS IN FAVOR OF AN ESTATE.

SECTION I.

VARIOUS MATTERS CONNECTED WITH THE COLLECTION OF CLAIMS
IN FAVOR OF THE ESTATE, AND THE COMMENCEMENT OF
ACTIONS.

Before proceeding to collect the debts due the estate, or to pay the claims against the same, the executor or administrator should procure a blank book, of suitable size, in which to make entries of the moneys by him received and disbursed in his trust capacity—naming dates, persons, and amounts (39). Such book will be invaluable to him in many respects; but more particularly at the time when he may desire to prepare his account for settlement with the court. It will also serve as a guide to those who represent him, in case of his death before final settlement of his account, in making report to the court of his progress in the administration.

Much confusion frequently arises from the careless manner in which executors and administrators keep their accounts and papers. No order is observed; no entries made from which to obtain a clue to their proceedings. The claims, vouchers, and other papers belonging to the estate are mingled indiscriminately with those belonging to the executor or administrator individually; and, in the event of his death before making final settlement, *his* executor or administrator will find himself wholly at fault in endeavoring to make such settlement for him. These things should not be so; and no better test of the qualifications of an executor or administrator can be adduced, than the manner in which he keeps his books, papers, and accounts.

Executors and administrators often rely upon obtaining from

the sale bill and inventory on file in the probate court, and the record of the proceedings in case of a sale of lands, the amount of assets with which they are chargeable, and consequently neglect to keep a minute of the moneys received by them in the course of their administration. But such papers and records are at best but imperfect guides, and *never* show the times *when* collections are made, nor the amount of interest received by the executor or administrator. Therefore, the only safe and reliable means by which an executor or administrator can avoid confusion and difficulty, is to keep a complete and accurate record of his proceedings in the manner suggested.

Separate entries need not be made in the book proposed, of the several amounts received for personal property sold at the sale, whether paid at the time of the sale, or at the expiration of the term of credit given, as the executor or administrator will be charged, on settlement of his account, with the amount of the sale bill in gross. But as he will be compelled to account for all interest received by him on moneys of the estate, he should be careful to note the several items of interest paid him upon sale notes: and so, in making collections, principal and interest should be entered in his book separately.

If, upon making settlement with any person against whom the estate has a claim, it be ascertained that such person has a counterclaim of less, equal, or greater amount than the one in favor of the estate, the executor should take a receipt from such person for the entire amount of his claim, and charge himself, in his account, with the amount due from such person to the estate. By striking a balance, and receiving or paying the same, as the case may be, and charging or crediting himself with such balance only, the executor or administrator is liable to cause confusion in his accounts, and may subject himself to the annoyance of being called upon, by the heirs and others interested in the estate, for explanations, as well as to the trouble of appearing before the probate judge for the same purpose.

But in allowing set-offs an executor or administrator should be careful not to receive any which were assigned to the holder of the same after the death of the decedent, unless the estate be so ample as to leave no doubt of its solvency. All legal claims against a deceased person, held previous to his death, by persons

indebted to the estate, are proper matters of set-off against any claims held by the estate against them; and this, although the estate be insolvent, and unable to pay creditors in full. But should there be a balance due any person holding such counter claim, after settlement with him, and should the estate be insolvent, the executor or administrator must not pay such balance in full, but must leave the same for payment in the same proportion as other claims of the same class proved and allowed against the estate.

As executors and administrators are liable upon their bonds for any loss that may result to an estate by reason of negligence or a want of proper diligence in making collections, a person administering an estate should be cautious in extending the time for the payment of claims in its favor. An executor or administrator can not extend time with the same liberality he might if the claims were his own, without incurring personal risk; and it is always a sufficient reason for his strictness that he is acting as the representative of others, and his duty to them as well as to his sureties requires that he should proceed with promptness and discretion.¹

Particularly should an executor or administrator refuse to extend the time for the payment of a note upon which there is bail, without the consent of the surety or sureties. He need not, it is true, make a demand of the principal debtor as soon as the note becomes due, in order to hold the sureties; nor will the sureties be released if, after making a demand, the executor or administrator should not take immediate legal measures to collect the amount due on such note; but to take money from a principal as a consideration for staying the collection of a note for a definite period, without the consent of the bail, will be fatal, and the bail will be released from further liability.²

(1) But an executor or administrator is not bound to sue a debtor who is notoriously insolvent, nor bring suit upon a claim which he knows to be unjust, or upon which he is satisfied he can not recover. He is required to act in such cases only as a man of sound discretion would if the business were his own. See also note 1, p. 84.

(2) *Bank of Steubenville v. Carrol's Adm'r*, 5 Ohio, 207; *Same v. Hoge*

Another reason for dispatch in making collections and commencing suits against persons indebted to the estate is to prevent claims from being barred by limitation. An obligation in writing, such as a contract, bond, note, etc. (except an official bond), will remain binding for fifteen years from the time when the same becomes due or a cause of action accrues thereon.^a A verbal promise to pay, and a book account, or other implied promise to pay, will remain valid for six years.^b And the time will not cease to run upon the death of the person to whom a claim is payable, but will continue until the claim becomes barred, unless suit be brought thereon, or a new obligation be entered into by the debtor.¹ But in case any part of the principal or interest due upon a written instrument for the payment of money, or upon a verbal promise to pay, or upon a book account or any implied promise, should be paid after the statute of limitations has commenced running, and before the claim has become barred, such promise in writing will be good for fifteen years, and such verbal or implied promise for six years, from the time of making such payment.^c

A mere verbal promise to pay a debt barred by the statute of limitations will not be sufficient to revive the same, nor will it prevent the running of the statute. To make such promise effectual, it must be in writing, and signed by the person making the same.^c

An administrator has no control over the real estate of an intestate except to sell it for the payment of debts, as will be hereinafter more fully explained; and can not lease or mortgage it; nor can he collect the rents that fall due from it after the death of the intestate, *except* the rents due upon a lease of the

et al., 6 Ohio, 17; Findlay's Ex'rs v. Bank of U. S., 10 Ohio, 59; Farmers' Bank of Canton v. Reynolds, 13 Ohio, 84; McComb v. Kittridge, 14 Ohio, 348.

(1) Granger's Adm'r v. Granger, 6 Ohio, 35; Coventry v. Atherton, 9 Ohio, 34. Niemcewicz v. Dayton's Adm'r, 13 Ohio, 271. See pp. 125, 126.

(a) §§ 4980, 4984.

(c) § 4992.

(b) § 4981.

same, made by the decedent in his lifetime.¹ Executors are sometimes authorized by will, or by their peculiar relations to the real estate of the testator, to lease the same: as to the collection of rents due, their powers and duties are the same as those of administrators.

When moneys, secured by a mortgage executed or assigned to the decedent in his lifetime, are paid to his executor or administrator, the executor or administrator is empowered and directed by statute to release and cancel the mortgage:^a should payment not be made, he is authorized to foreclose the mortgage, or take possession of the mortgaged property, peaceably or by suit, in like manner as the decedent might do were he living.^b

Should the decedent have taken possession of such mortgaged premises in his lifetime, or should the executor or administrator take possession of the same after his death, either peaceably or by law, the executor or administrator will be seized of such mortgaged premises, until redeemed, in trust for the benefit of the persons interested in the estate.^c And any real estate held by an executor or administrator upon foreclosure of mortgage, may be sold for like purposes, and in like manner, as is pre-

(1) The lands of an intestate descend at once to his heir, and the legal title vests in him, subject to the right of the administrator to sell the same for the payment of the debts of the intestate, in the manner prescribed by law. Therefore the rents of the lands of an insolvent intestate, accruing between the death of the intestate and a sale of the lands for the payment of debts by the administrator, belong to the heir and not to the administrator. *Overturf v. Dugan*, 29 Ohio St. 230.

An administrator who, without authority, collects rents of his intestate's real estate, and uses them as assets in paying the debts of the estate, is liable to the party entitled to such rents, and he may recover the amount thereof of the administrator in his representative character. *Conger, Adm'r v. Atwood*, 28 Ohio St. 134. As to widows right to rents of mansion-house, see note 1, p. 38.

(a) § 6071.

(c) § 6071.

(b) §§ 6070, 6072. For rest of § 6070, see p. 72.

scribed by law for the sale of real estate of which the decedent died possessed.¹

Should an executor or administrator obtain a mortgage upon real estate from any person indebted to the estate, he should at once deposit it in the recorder's office of the county, for record, as it may lose its preference as a lien by delaying such deposit.^a

If the mortgage be upon personal property, it should be forthwith deposited with the clerk of the township, or, if made in the township in which the county seat is situate, with the county recorder.^b

Such chattel mortgage must be refiled within thirty days next preceding the end of one year from the date of the original filing, and an affidavit stating the interest of the mortgagee in the property at the time of refileing, must be indorsed thereon, if for any reason the debt secured by such mortgage be not paid by that time.^c

Should an executor or administrator take notes from persons indebted to the estate upon book account, or any other species of claim, he should make them payable to himself as executor or administrator of the decedent, and to his successors in office, or in trust, or in the administration (41), to indicate that such notes are the property of the estate, and not of the executor or administrator.²

Should there be money due a decedent upon a contract for the sale of land, an executor or administrator can not, in some instances, bring suit to recover the amount without first tendering the purchaser a valid deed; and such deed can not be made un-

(1) A mortgagee, by making his debtor his executor, does not thereby extinguish the mortgage, but the same may be foreclosed by an administrator *de bonis non*. Collard's Adm'r v. Collard et al., 17 Ohio, 264.

(2) In McCoy v. Kercheval's Adm'r, 7 Ohio (pt. 1), 268, it was held that where a note is made payable to A. B., "administrator of C. D., deceased," and A. B. dies, his administrator must sue to recover the amount of the note, and not the administrator *de bonis non* of C. D. But an administrator may sue, *as such*, in all cases where the money, if recovered, would be assets. Howard's Adm'rs v. Powers, 6 Ohio, 92.

(a) § 4133.

(c) § 4155.

(b) §§ 4150, 4151.

til an order of the probate or common pleas court has been obtained in the manner treated of in Chapter XII. of this volume.

An executor or administrator can not maintain an action for a trespass upon the lands of the decedent, nor for overflowing the same by means of a dam, nor for waste, when the injury and right of action accrues after the death of the decedent, unless the possession of the premises is given him, either expressly or constructively, by will.

Nor can an executor or administrator bring suit upon the covenants of warranty in a deed, unless the breach occurred previous to the death of the decedent. The real estate of the decedent descends, at his death, to the heirs or devisees; and with it, and with causes of action springing from it after that time, the executor or administrator has nothing to do, unless by virtue of some power conferred by will, or it is needed to pay debts of the decedent which can not be satisfied from his personal property.

The executor or administrator may, in general, bring suit upon any personal contract of the decedent, to recover for any breach of the same either before or after his death.

Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, will be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to murder in the first or second degree, or manslaughter.^a

Every such action must be for the benefit of the wife or husband and parents and children, or if there be neither of them, then of the next of kin, of the person whose death shall be so caused, and it must be brought by and in the name of the personal representative¹ of the person deceased; and in every such

(1) Under the statute of March 25, 1851, entitled "an act requiring compensation for causing death by wrongful act, neglect, or default," an action

(a) § 6134.

action the jury may give such damages, not exceeding in any case ten thousand dollars, as they may think proportioned to the

may be maintained by the administrator of the estate of a deceased person for the benefit of the next of kin of the deceased, though he leave no widow or children, and though the petition do not contain a statement of special circumstances rendering the death a pecuniary injury to them. Such special circumstances can affect only the *amount* of the recovery. *Lyons' Adm'r v. Cleveland and Toledo R. R. Co.*, 7 Ohio St. 336.

In an action by the administrator of a woman killed by the carelessness of a railroad company, the petition alleging and proof showing that the deceased left a son as her sole surviving heir, it was held that the fact of such child's legitimacy or illegitimacy can in no respect affect the right of action in his behalf. *Muhl's Adm'r v. Michigan Southern R. R. Co.*, 10 Ohio St. 272.

An administrator appointed in this state can not maintain an action in the courts of this state, under a statute of the State of Illinois, authorizing the personal representative of a person who comes to his death by the wrongful act, neglect, or default of another, to maintain an action against such other for damages, for the benefit of the widow or next of kin of such deceased person. *Woodard's Adm'r v. Michigan S. & N. I. R. R. Co.*, 10 Ohio St. 121.

An instruction to the jury calculated to mislead, either as to the real issue in the action or as to who are the beneficiaries therein, is error. *Steel v. Kurtz*, 28 Ohio St. 191.

The amount of damages (within the limit of the statute) are to be ascertained by the jury from the proofs in the case, and are to be a fair and just compensation to the widow or next of kin, with reference to the *pecuniary injury* resulting to the beneficiary from such death. *Ib.*

In such action, the jury, in assessing the damages, are limited to giving pecuniary compensation for injuries resulting to the beneficiaries in the action on account of the death of the deceased. No damages can be given on account of the bereavement, mental suffering, or as a solace on account of such death. *Ib.*

In determining the pecuniary injury resulting from the death, the reasonable expectation of what the next of kin might have received from the deceased, had he lived, is a proper subject for the consideration of the jury. *Grotenkemper v. Harris*, 25 Ohio St. 510.

For the amount recovered in such action is for the exclusive benefit of the widow and next of kin, and is to be distributed among them in the proportions provided by law in relation to the distribution of personal estates of persons dying intestate. The risk of ascertaining the persons entitled to the benefit of the recovery, and the duty of making the distribution, are not imposed on the defendant, but on the personal representatives of the deceased. (Besides, if the widow and next of kin could recover in their

pecuniary injury resulting from such death, to the persons, respectively, for whose benefit such action shall be brought; and

own names a joint judgment against the defendant, the judgment might be satisfied by payment to either of the plaintiffs, and thus defeat the distribution required by the statute.) *Weidner v. Rankin*, 26 Ohio St. 522.

In an action by the personal representative, under the statute of 1851 (S. & C. 1139, 1140), to recover damages for causing by wrongful act and neglect the death of a woman, who died intestate, leaving a husband, but no children or their legal representatives: *Held*, the surviving husband is, within the meaning of said act, the next of kin, and as such entitled to the fruits of any judgment obtained in the action. *Steel v. Kurtz*, 28 Ohio St. 191.

While the proceeds of a judgment recovered in an action under this statute are directed to be distributed to the beneficiaries of the judgment in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate, the money realized is not to be treated as part of the general estate of the intestate. The personal representative in whose name the action is brought is a trustee of the fund, and must distribute the proceeds of the judgment to those to whom the general personal estate would descend, according to the course of the statute of descents and distribution. *Ib*.

The act of May 25, 1851 (S. & C. 1139), allowing an action by the representatives of a party whose death was caused by the wrongful act of another, does not extend to cases where the wrongful act which caused the death was committed outside the State of Ohio. *Hover, Adm'r, v. Pennsylvania Co.*, 25 Ohio St. 667.

Where an action for damages for wrongfully causing death was brought by the widow and next of kin, instead of by an administrator, and one of the plaintiffs having been appointed administratrix, and the court, after judgment, having ordered that she be made a plaintiff as such administratrix: *Held*, a good petition must contain a cause of action in favor of the plaintiff, and where it does not show such cause of action, the objection is not waived by the failure of the defendant to demur, although the facts stated may constitute a cause of action in favor of a person not a party to the suit. *Weidner v. Rankin*, 26 Ohio St. 522.

Under the act requiring "compensation for causing death by wrongful act, neglect, or default," etc., persons who had no legal claim for support upon the deceased may, as next of kin, have an action maintained for their benefit, to recover the compensation allowed by the statute. *Grotenkemper v. Harris*, 25 Ohio St. 510.

The right to bring an action under the act of March 25, 1851, for the death of a person caused by wrongful act, neglect, or default, is vested in the personal representatives of the deceased; and the widow and next of

the amount recovered, after deducting the costs and expenses chargeable to such representative, must be divided among the before mentioned persons in such proportions as the jury by their verdict may find and direct.^a

When there is money due the decedent for labor done, or for materials or machinery furnished, for constructing, altering, or repairing any building, bridge, or water-craft, or any street, turnpike, sidewalk, drain, ditch, sewer, etc., by virtue of a contract between him and the owner of the property benefited, or any contractor or sub-contractor under such owner, it is the duty of the executor or administrator to take a mechanics' lien upon such property to receive such money. The provisions of law relating to such liens are given in Chapter XIV., Section II.

kin can not maintain such action in their own names. *Weidner v. Rankin*, 26 Ohio St. 522.

Under the "act requiring compensation" for causing death by wrongful act, neglect, or default (S. & C. 1139, 1140), which gave a right of action, *provided* such action should be commenced within two years after the death of such deceased person, the proviso is a *condition* qualifying the right of action, and not a mere limitation of the remedy. The amendment and repeal of the section containing the proviso, during the existence of the right of action, and the omission of the proviso in the section as amended, did not have the effect of extending the time within which the action should have been brought. *P., C. & St. L. Ry. Co. v. Hine's Adm'r*, 25 Ohio St. 629.

In an action under the "Adair liquor law" (67 Ohio L. 101), for injury to means of support, in consequence of intoxication, which caused the death of the intoxicated person, damages resulting from the death can not be recovered. *Davis v. Justice*, 31 Ohio St. 359.

For other cases bearing on this subject, see notes 5-16, pp. 337-339; note 1, p. 172; also *Bradley, Adm'r, v. Northern Transportation Co.*, 15 Ohio St. 553; *Meara's Adm'r v. Holbrook et al.*, 20 Ohio St. 137; *C. C. & C. R. R. Co. v. Crawford, Adm'r*, 24 Ohio St. 631; *McClardy's Adm'r v. Chandler*, 2 W. L. G. 1; *Hall's Adm'r v. Crain*, 2 W. L. M. 137, and 2 W. L. M. 593; *Such's Adm'r v. C. C. & C. R. R.*, 2 W. L. M. 486; *Groff's Adm'r v. C. & I. R. R.*, 1 C. S. C. R. 264; *Monley v. C. H. & D. R. R.*, 1 H. 481, 490; *Campbell's Adm'r v. Rogers*, 2 H. 110; *Lawton v. Maratta*, 2 C. S. C. R. 82; *Van Camp v. Aldrich & Co.*, 2 A. L. R. 454; *Mason v. Shay*, 1 A. L. R. 553; *Dunhene's Adm'r v. O. L. & T. Co.*, 1 D. 257; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; *R. R. v. Fitzpatrick*, 31 Ohio St. 479; *R. R. v. Peoples*, 31 Ohio St. 537.

(a) § 6135.

Actions for libel, slander,¹ malicious prosecution, assault, or assault and battery, for nuisance, and against a justice of the peace for misconduct in office, abate upon the death of either party.^a In other actions, as for *mesne* profits, for an injury to real or personal property,² for fraud or deceit, for money due, for the recovery of personal property, and many others,^b the action survives the death of either party, and the executor or administrator of a party in whose favor or against whom such actions are pending, should cause himself to be made plaintiff or defendant, as the case may be, in order to prosecute or defend the same. As this will involve the necessity for employing an attorney, it is not necessary here to point out the method by which an executor or administrator may be made a party to such suits.

Should there be a judgment in favor of a decedent which has become dormant, the same may be revived in favor of the executor or administrator;^c but as this, also, will require the services of an attorney, it will be unnecessary to detail here the manner in which such revivor may be affected.

An executor or administrator can not bring suit to recover upon a book account, note, or receipt, against any heir of the deceased, for advancements made to him in the lifetime of the deceased. Such advancements must be adjusted in the final dis-

(1) In *Dial's Adm'r v. Holter*, 6 Ohio St. 228, it was held that where the defendant, in an action for libel and slander, died after verdict, but before judgment, the action did not abate, but judgment upon the verdict could be entered after his death.

(2) In *M. E. Church of Dayton v. Rensch's Adm'r*, 7 Ohio St. 369, it was held that where the injury to property resulted after the death of the decedent, from negligence or default on his part in his lifetime, no action could be maintained against his administrator, as no specific wrong was suffered from the decedent's acts in his lifetime, and there was no cause of action to survive his decease. Personal torts which die with the person are not assignable. *Grant v. Ludlow's Adm'r et al.*, 8 Ohio St. 1.

(a) § 5144. See also p. 92.

(b) §§ 4975, 5012, 5145, 5147, 6323, 5675, 5679, 5687, 5628, 5629, 4517.

(c) §§ 5366-5371, 5685.

tribution of the estate, and in no event can they be assets in the hands of the executor or administrator.¹

Where the deceased, in his lifetime, was bound as surety for another, upon a bond, bill, note, or other evidence of debt, and the same has become due and payable, his executor or administrator may require the creditor, by notice in writing,² forthwith to commence an action against the principal debtor or debtors; and, thereupon, should the creditor fail to proceed with proper diligence to make the amount due upon said claim, the liability of the deceased as surety thereon will cease. On the other hand, should there be a written evidence of debt, with personal security thereon, in the hands of an executor or administrator, and should the surety give *him*³ a like notice to proceed by judgment and execution to collect the amount of the claim from the principal debtor or debtors, the executor or administrator must forthwith institute legal proceedings thereon, or such surety will be released, and the executor or administrator will become personally liable to the estate for his neglect.^a

Nothing contained in the preceding paragraph shall be so construed as to affect bonds required by law to be given by executors, administrators, public officers, or any bond or undertaking required by law to be given in an action or legal proceeding, in any court of this state.^b

(1) See Chapter VIII., Section II.

(2) In order to discharge a surety from liability, such written notice must contain an unconditional requirement to commence an action forthwith; and a notice that the surety "wishes" the creditor "to proceed against the principal debtor" and "collect the claim, or have it arranged in some way," and that the surety "does not wish to remain bail any longer," is not sufficient. *Baker et al., Adm'rs, v. Kellogg et al.*, 29 Ohio St. 663. See also *Headington v. Neff*, 7 Ohio, 229; *Jenkins v. Clarkson*, 7 Ohio, 72.

(3) Where the claim is in favor of an estate, and there are several administrators or executors, a service of notice upon one of them is sufficient. *Baker et al., Adm'rs, v. Kellogg et al.*, 29 Ohio St. 663.

SECTION II.

THE DISPOSITION OF DESPERATE CLAIMS; AND THE ALLOWANCE OF
FURTHER TIME TO COLLECT ASSETS.

Should any claim, debt, or demand belonging to an estate, which existed at the time of the death of the decedent, become desperate in the hands of the executor or administrator, on account of the actual insolvency or doubtful solvency of the person or persons indebted, or on account of such debtor having availed himself or herself of the bankrupt law of the United States, or by reason of a legal or equitable defense claimed by such debtor or debtors, and shown to exist against the same; or, on account of the smallness of such claim, and the difficulty there may be in collecting the same, owing to the remoteness of the residence of such debtor or debtors, or because his or their place of residence may be unknown to the executor or administrator, the executor or administrator may make proof to the probate court (42) of the existence of one or more of such reasons, and the court may order (44) that such claim, debt, or demand shall be compounded with the debtor or debtors, or be sold, or be filed in such court for the benefit of his heirs, devisees, or such of the creditors of the deceased as will sue for or recover the same—the creditors to be preferred, if they apply for such claim before the final settlement of the estate. The order of the court in such case will be a sufficient voucher to the executor or administrator, and will exonerate him from making any further effort to collect such claims.^a

Should any claims or demands exceed the sum of ten dollars, or should they all in the aggregate exceed the sum of five hundred dollars, the executor or administrator must give notice (43) of his intention to apply to court for an order in relation to the same, by publication in a newspaper of general circulation in the county, for at least three consecutive weeks prior to the time of making such application. But if the claims are numerous, they need not be described in such notice.^b

(a) § 6077.

(b) § 6078.

If the court order a sale, notice of the time and place of sale (45) must in like manner be published, for at least three consecutive weeks before the day of sale; and at the time appointed the claims must be sold to the highest bidder, if any bids are offered (46); but the court may, in its discretion, order a private sale (121) of such debts and demands, in like manner and for like reasons (119) (120) as provided for the private sale of goods and chattels;¹ and if the court authorize the compounding of such claims, or any of them, the court must in the order fix the sum for which the same may be compounded (44).^a

Though the law seems to make no provision for it, yet the probate judge may require proof of such publication to be made in the same manner as such proof is made in case of sale of real estate to pay debts;² and whether so required or not, an affidavit (71) concerning such publication for the required number of weeks should be made and filed in the court, as a matter of precaution against future contingencies.

When any debtor of a deceased person is unable to pay all his debts,¹ the probate court may authorize the executor or administrator to compound with him, and give him a discharge upon receiving a just and fair dividend of his effects, or such other part of the amount due as the court may deem best for the interests of the estate.^b

An executor or administrator is required, so far as he is able, to collect the assets of the estate within one year from the date of his bond.^c

If, on account of claims belonging to the estate which are not due, or the pendency of suits in favor of the estate, or for any other cause, more than eighteen months' time from the date of the administration bond should be required to collect the assets of the estate, the executor or administrator must file his motion (47) in the probate court of the county, for an extension of time. This motion must be supported by the affidavit (47) of

(1) See Chapter IV., Section I.

(2) See Chapter VII., Section I.

(a) § 6079.

(b) § 6073.

(c) § 6062.

the applicant, setting forth the reason why an extension of time is necessary ; stating also the amount of moneys applicable to the payment of debts remaining in his hands ; and that he has used due diligence to collect the assets and pay the debts of the estate.^a

If the probate judge be satisfied that the reasons contained in the motion and affidavit really exist, he may extend the time for collecting such assets for any period not exceeding one year (48). Should cause for further extension exist at the expiration of the time allowed, another motion and affidavit must be filed, in order to obtain such additional time.^b

The probate judge is not authorized by law to allow further time for the collection of assets, after the expiration of five years from the date of the administration bond ; nor can he, legally, at any time, extend the time of collection, if the estate be solvent, and the executor or administrator have more than one hundred dollars in his hands subject to the payment of the claims of creditors.^b

The time allowed executors and administrators relates to the collection of assets only, and does not exempt them from filing accounts at the times prescribed by law, nor from being cited in case of failure to file the same.

In some of the probate courts of the state a rule has been established, that time will not be allowed an executor or administrator, *in any case*, until an account has been filed showing that he has used due diligence in collecting and disbursing the assets of the estate. This is an excellent regulation, and should be adopted by every probate judge in the state.

The office of executor or administrator does not cease at the expiration of the five years beyond which the probate court can not extend the time for the collection of assets, but his powers continue until the estate is finally settled, unless terminated by his death, resignation, removal, or the revocation of his letters.^c

He, or his successor, is the only person who can collect assets of the estate which were disposed of by will, for life only, to

(a) §§ 6063, 6064.

(b) §§ 6065, 6066.

(c) § 6067.

some legatee, or held as a homestead during the minority of a child, or which, for other reasons, were beyond his control or knowledge for a long term of years, even though, in the meantime, he should have made a settlement with the court. The heirs or creditors entitled to such assets, can get them, by law, only through him.¹

(1) Davis et al. v. Corwine et al., Ex'rs, 25 Ohio St. 668, 674; Taylor et al. v. Thorn, Adm'r, 29 Ohio St. 569.

CHAPTER VI.

RELATING TO THE PAYMENT OF DEBTS AND LEGACIES.

SECTION I.

IN WHAT ORDER CLAIMS AGAINST AN ESTATE MUST BE PAID; HOW SUCH CLAIMS MUST BE AUTHENTICATED; HOW AND WHEN SUIT MAY BE BROUGHT AGAINST AN EXECUTOR OR ADMINISTRATOR, ETC.

It is the duty of every executor and administrator to proceed with diligence to pay the claims existing against the estate which he administers.¹ The personal assets in his hands must be applied in the following order:^a

First. To the payment of the expenses of the last sickness and funeral of the deceased, and the costs of administration.

The expenses of the last sickness will include physician's bills, medicine, nursing, and such other expenses as were incurred especially for the benefit of the decedent during his last illness. The expenses of the funeral will include a coffin, digging the grave, use of a hearse, carriages for the family when necessary, grave clothes, and such other expenses as may be incidental to burying the deceased in accordance with his condition and circumstances in life.

(1) In case an executor or administrator receive bank bills in the course of his administration, and fail to pay them over to creditors or heirs as rapidly as the condition of the estate will allow, he will become personally liable for the loss, in case they should become worthless in his hands.

An administrator is more than a representative of the decedent, but is also a trustee for the creditors, and entitled to assert their claims against fraudulent contracts, even if these were binding on the decedent. Kilbourne v. Fay, 29 Ohio St. 264, 279.

(a) § 6090. But see 89 O. L. 78, "Fifth."

The costs of administration will include probate judge's fees connected with the appointment, recording inventory and sale bill, fees upon petition to sell lands, or petition to complete contract, fees upon final account, etc.; the fees of the appraisers of real or personal property; fees of the auctioneer and clerk of the sale; printer's fees for giving notice of appointment and sale; attorney's fees; costs which may be adjudged against the estate in any suit necessarily brought by the executor or administrator, or in any suit brought against him as such (except upon a citation to settle, or other suit brought on account of his default or wrongful acts); expenses of cutting, threshing, and hauling grain; commission of the executor or administrator; and all other expenses necessarily incurred in settling the estate of the decedent in a discreet and lawful manner. But the mourning clothes of the widow and children are not expenses of administration, and can not lawfully be paid by the executor or administrator. The expenses of the last sickness and funeral of the deceased, and the cost and expenses of administration, are of equal rank, and are entitled to payment in preference to all other claims against the estate, even though the entire personal estate of the decedent should be required for that purpose.

Second. To the payment of the allowance made to the widow and children for their support for twelve months. This claim is next in the order of preference, and is entitled to payment before any portion of the claims comprehended within the classes which follow.¹

Third. To the payment of debts entitled to a preference under the laws of the United States.²

This will comprehend all claims held by the United States against any person residing within this state, or upon whose estate administration has been granted within the state. But an executor or administrator will not be bound for the payment of such claims out of the assets in his hands, unless they are presented, and satisfactory proof of their validity is made to him as in other cases.²

Fourth. To the payment of public rates and taxes, and sums due the state for duties upon goods sold at auction.

(1) See note 1, p. 67.

(2) See U. S. Rev. Stat. §§ 3466, 3467; also, Giaque's Manual for Assignees, pp. 242-244.

An executor is bound by law to list and pay the taxes upon both the real and personal estate of a decedent in his possession or under his control by virtue of a will, and failing so to do he will be liable to an action by the devisee or devisees for any damage occasioned by his neglect.^{1a} An administrator is bound to pay taxes which accrued upon the real or personal estate of the decedent, and were payable in his lifetime,² and upon the personal estate in his hands as administrator.^b But he is not authorized to pay the taxes levied upon the real estate of the decedent after his death,³ unless such real estate be needed for the payment of debts.

Fifth. To the payment of every other class of debts.⁴

The personal assets are to be applied in the order just indicated, as far as they will reach. The creditors of any of the foregoing classes are not entitled to payment until those of all the preceding classes are paid; and should there not be sufficient assets left to pay all the creditors of any particular class, after payment of the classes which precede, all the creditors of that class are to be paid ratably, in proportion to their respective claims.^c

But should any creditor have a chattel mortgage, levy, or other lien upon the personal estate of the decedent, which he obtained in the lifetime of the decedent, such lien will remain good, and such creditor may require that the same shall be satisfied, or that the proceeds of the sale of such property shall be applied,

(1) Where three executors of an estate reside in the same township—two of them within the corporate limits of a village, the other without such limits, and the three have possession, in law, of the taxable moneys, credits, bonds, and stocks of the estate, the same must, in view of the equities and analogies of the statute (which does not expressly provide for such case) be entered for taxation—one-third as of the place of residence of each executor. *Ohio ex rel. Harkness et al. v. Matthews, Auditor, etc.*, 10 Ohio St. 431.

(2) In such case the tax is a debt of the estate, and if the administrator have not personal assets to pay for the same, he may apply for an order to sell lands for that purpose. *Welsh et al. v. Perkins et al.*, 8 Ohio, 52.

(3) *Piatt v. St. Clair's Adm'rs et al.*, 6 Ohio, 227.

(4) For changes in law, see 80 O. L. 78.

(a) §§ 2845, 2847, 2849, 2851.

(c) § 6090.

(b) § 2734.

so far as they may reach, in payment of his claim, before permitting such property to be administered according to law.^{1 a}

Should all the assets be exhausted in paying preferred claims, and should the administrator thereupon make settlement with the court, such settlement will be a bar to any action brought by a creditor who is not entitled to a preference, although the estate may not have been declared insolvent.^{2 b}

The moneys arising from the sale of real estate are to be applied as follows:

First. In payment of the costs and expenses of the sale. These include the fees of the probate judge, sheriff, justice of the peace for swearing appraisers, printer, attorney, surveyor, the percentage and charges of the administrator upon the sale, and other necessary expenses growing out of the petition for the sale and the proceedings had in pursuance of the same.

Second. To the payment of mortgages, judgments, and other liens upon the real estate sold, in the order of their priority, which is to be determined by the court granting the order of sale.³

The residue of such moneys is to be applied in payment of

(1) A creditor can not, however, by making a levy subsequent to the death of his debtor, under a judgment obtained against him before his death, obtain a lien upon either his personal or real estate in preference to other creditors. *Lessee of McCartney v. Reed*, 5 Ohio, 221. And a sale made by virtue of such levy is void. *Lessee of Massie's Heirs v. Long et al.*, 2 Ohio, 287. Upon the death of a debtor, his estate, of whatever description, stands for the payment of all his general creditors alike; and one creditor can not, by superior diligence, acquire a superior right to any part of the estate. *McDonald et al. v. Aten et al.*, 1 Ohio St. 293. But if the debtor die after execution is issued and levied, the execution proceeds as if the death had not taken place. *Lessee of Massie's Heirs v. Long et al.*, 2 Ohio, 287. (Or Vol. 1-2, p. 412.)

(2) See also pages 106, 161, 181, 119.

(3) In *Bank of Muskingum v. Carpenter's Adm'r*, 7 Ohio (pt. 1), 21, it was held that the purchasers of land at administrator's sale took the same discharged of liens, and that the holders of liens must look to the administrator and his sureties for the faithful application of the purchase-money. See also *Stiver's Adm'r v. Stiver's Heirs et al.*, 8 Ohio, 217; and *Miller's Ex'rs v. Greenham's Adm'r et al.*, 11 Ohio St. 486.

other claims against the estate, in the order prescribed for the appropriation of the personal assets.^{1a}

Unless the solvency of an estate is beyond all doubt, the executor or administrator should not pay any of the ordinary claims against the same until the expiration of one year from the time of giving the notice of his appointment; after which, if the property in his hands, subject to the payment of debts, should be sufficient to pay all the claims against the estate of which he has notice, he is authorized by law to proceed to the payment of the ordinary debts, and will not be liable, in case claims should subsequently be presented amounting to more than the balance of the assets in his hands;² as will be more fully explained in the sequel of this section.^b

But should the executor or administrator, at the expiration of the year, have notice of claims amounting to more than the value of the real and personal estate of the decedent, he should at once represent the estate to the probate court as insolvent, and take measures accordingly.^c

The preferred claims against the estate will not be affected by its solvency or insolvency, and the executor or administrator may proceed with entire safety (and it is indeed his duty) to pay them, in the order of priority before indicated, out of the first moneys that come into his hands. And, as before observed, the estate need not be represented insolvent, in case the assets will not more than suffice for the payment of the preferred claims.^d

(1) In equity the proceeds of lands directed by will to be sold are treated as personal estate. *Collier v. Collier's Ex'r*, 3 Ohio St. 369; *Ferguson et ux. v. Stuart's Ex'r*, 14 Ohio, 140; *Brewster et al. v. Benedict et al.*, 14 Ohio, 368.

(2) If the estate be insolvent, the administrator pays at his peril; and if he pays any one creditor more than his due proportion, he does so in his own wrong, and is liable to the unpaid creditor for his proportion of the assets applicable to the payment of the debts of the estate. *Abbott's Ex'rs v. Cole's Adm'rs*, 5 Ohio, 86. But an administrator who has paid a creditor more than his share of the assets applicable to the payment of claims of his grade, may recover back the excess, as for money of his own paid by mistake. *Rogers v. Weaver*, 5 Ohio, 536.

(a) § 6165.

(b) § 6109.

(c) § 6111. See also p. 119.

(d) § 6112. See also note 2, p. 105.

A debt due to a woman is extinguished by her intermarriage with the debtor,¹ and she is not entitled to payment of her claim out of his estate after his death. But debts due to the wife by the husband, made after marriage, in good faith, are valid and must be paid.²

Before allowing or paying any bond, note, due bill, contract, book account, or other claim against an estate, the executor or administrator may (and in most cases *should*) require the affidavit of the claimant that the amount demanded is justly due to him, that no payments have been made thereon, and that no set-offs exist against the same (or, if any, their nature and amount), to his knowledge (49).^a

The affidavit may be made before a judge of the court of common pleas, probate judge, deputy clerk of the probate court, justice of the peace, mayor of any incorporated city or village, or notary public, and must be indorsed upon or attached to the claim. In case the claim should be allowed, the expense of proving the same must also be allowed and paid by the executor or administrator.^a

If the executor or administrator should doubt the justice of any claim presented to him (even though the affidavit of the claimant should be attached thereto), he may enter into an agreement in writing with such claimant, to refer the matter in controversy to the arbitration of three disinterested persons (50), who, if the claim do not exceed one hundred dollars in amount, must be approved (51), by a justice of the peace of the county in which the parties or either of them reside; but should it exceed that amount, such referees must be approved (52) by the probate judge of the county in which administration of the estate was granted.^{3 b}

(1) *Smiley v. Smiley's Adm'r*, 18 Ohio St. 543.

(2) *Wood v. Warden*, 20 Ohio, 518; *Miller's Ex'r v. Miller*, 16 Ohio St. 527; *Bettle v. Wilson*, 14 Ohio, 257, 269; *Thomas v. Brown*, 10 Ohio St. 247.

(3) When the probate judge has approved the referees, his duty and authority in the matter end. The reference must be perfected, and the referees report to the common pleas court, where the matter is disposed of. *Anderson v. Baker*, 15 Ohio St. 173.

Should the amount of the claim so referred not exceed one hundred dollars, the agreement of reference, with the approval of the referees, may be filed with a justice of the peace to be selected by the parties (who, if the parties desire it, may be the one who approved the referees); and such justice is required by law to docket the cause, appoint a day for trial, issue a citation for the referees (53), and also subpoenas for the witnesses; and upon the trial the manner of proceeding must be in all respects the same as is provided for arbitration before justices of the peace, except that if judgment be rendered against the executor or administrator for debt, damages, or costs, it must be rendered and execution issued thereon as in actions against executors or administrators.^a

The law governing such arbitrations is as follows:

"When the arbitrators shall convene and be qualified, they shall proceed to hear and determine the cause, and make out their award in writing, which shall be valid when signed by any two of them, and return the same to the justice, who shall thereupon enter such award on his docket, and thereon render judgment and issue execution, as in other cases.^b

"And every judgment entered on such award shall conclude the rights of the parties thereto, unless it shall be made to appear to the justice of the peace who rendered such judgment, and within ten days from the rendition of the same, or to the court of common pleas, on appeal, that such award was obtained by fraud, corruption, or other undue means.^c

"Whenever satisfactory proof shall be adduced before such justice, within the period aforesaid, that such award was obtained by fraud, corruption, or other undue means, it shall be competent for such justice to set aside such award and his judgment thereon rendered, and thereupon proceed to such final trial and judgment, as if such award had never been made.^d

"But no appeal shall be allowed to the court of common pleas, from any judgment of a justice of the peace rendered on an award, unless the party praying such appeal shall file with such justice an affidavit, therein stating that he or she does verily

(a) § 6094.

(b) § 6567.

(c) § 6568.

(d) § 6569.

believe that such award was obtained by fraud, corruption, or other undue means.^a

"And if on appeal from the judgment of a justice rendered on any such award, the court of common pleas shall be satisfied that the award was obtained by fraud, corruption, or other undue means, such court shall set aside the award, and proceed to hear and determine the cause on its merits, as in other cases of appeal.^b

"But if the said court shall be of opinion that the award was not obtained by fraud, corruption, or other undue means, they shall render judgment thereon, and for the costs of suit, and award execution as in other cases."^c

The arbitrators are entitled to fifty cents each per day; to be taxed and collected with the other costs of suit.^d

If the claim referred to arbitration exceed one hundred dollars in amount, the agreement of reference, with the approval of the referees by the probate judge indorsed thereon, must be filed with the clerk of the court of common pleas of the county in which letters were issued, and it thereupon becomes the duty of the clerk to docket the cause, and enter a rule referring the matters in controversy to the persons agreed upon (54). This rule may be entered during vacation or in term time, and rests solely within the province of the clerk.^e

The referees must thereupon proceed to hear and determine the matter, and make their report (55) thereon to the court of common pleas;¹ and the same proceedings may be had before said referees, in all respects; they shall have the same powers, be entitled to the same compensation, as if the reference were made under the provisions made for arbitrations under a rule of the court of common pleas; and the court may set aside the report of the referees, or appoint others in their places, or confirm such report (56), and adjudge costs, as in actions against execu-

(1) *Anderson v. Baker's Adm'r*, 15 Ohio St. 173.

(a) § 6570.

(b) § 6571.

(c) § 6572.

(d) §§ 6564, 6566.

(e) § 6095.

tors and administrators; and the judgment¹ of the court thereupon will be valid and effectual, in all respects, as in other cases.^a

When a claim against an estate is presented to the executor or administrator, he may allow or reject the same at once, or may keep it in his possession for examination a reasonable period of time, in order to determine what disposition to make of it.² If the claim be allowed he should indorse such allowance thereon,³ and if disputed or rejected he should indorse the fact and sign his name thereto as executor or administrator (57). A refusal

(1) Such judgment can be attacked for fraud. *Conway v. Duncan*, 28 Ohio St. 102.

(2) *Keenan v. Saxton's Adm'r*, 13 Ohio, 41.

The petition in an action against an executor, upon a bond as residuary legatee, for the payment of all the debts and legacies of the testator, under the fourth section of the act to provide for the settlement of the estates of deceased persons, passed March 23, 1840, need not show a presentment of the claim to the executor for allowance or rejection, or other matter to allow the bringing of an action, specified in the ninety-eighth section of the same act. *Stevens et al. v. Hartley*, 13 Ohio St. 525.

(3) By indorsing "allowed" upon a claim, the executor or administrator is not precluded from subsequently disputing its correctness.^b

The creditor of a person deceased exhibited his claims against the estate of his debtor to the executor, for the distinct purpose of having it allowed by them as a valid claim against the estate; and the executors thereupon distinctly refused to allow the claim, and told the creditor to consider it as rejected by them. *Held*, that such refusal by the executors was a rejection of the claim, although no formal demand was made at the time that the executors should indorse their allowance upon said claim; and that the six months' limitation commenced to run from the date of such rejection. *Harter v. Taggart*, 14 Ohio St. 122. Where an administrator has seen and examined a claim against the estate he represents, and is subsequently requested to allow it, which he refuses to do, such claim being present in the pocket of its owner, and the administrator so told, a formal presentation of the claim is not necessary, but may be presumed to be waived. *Kyle's Adm'r v. Cheeseman*, 15 Ohio St. 15.

In an action against an estate, it is not necessary to aver or prove that, at the time the claim upon which suit is brought was rejected by the executor or administrator, a specific demand was made for the indorsement of his allowance thereon. *Stambaugh v. Smith*, 23 Ohio St. 584. See 36 O. S. 454.

(a) § 6096.

(b) § 6216.

to indorse an allowance upon such claim will have the effect of a rejection of the same.^a (See also pp. 198, 199.)

An executor or administrator should not fail to make a memorandum of each claim presented to him, stating the creditor's name, the nature and amount of the claim, and such other particulars as may at any time enable him to ascertain the amount due thereon. Such memoranda may be of great service to him during the progress of the settlement of the estate.

If such claim be presented to the executor or administrator before the estate is declared insolvent, and the same be disputed or rejected, and no agreement to arbitrate be entered into, the claimant must bring suit upon the same within six months from the time of such rejection, or within six months from the time when some part of such claim becomes due, or he and all persons who claim under him by indorsement or otherwise will be forever barred from maintaining an action thereon.^{1a} And an executor or administrator may plead and give in evidence, as a complete defense against any suit commenced after the expiration of the time allowed for that purpose, the fact that the claimant failed to commence suit within the time limited.

If any heir or creditor of a deceased person, or any person who has purchased, or claims to hold, by purchase or otherwise from such heir, any lands or other property inherited by such heir from such decedent, shall file in the probate court of the county, in which administration is taken out on any estate, a written requisition (138) on the administrator or executor, to disallow and reject any claim presented for allowance, and whether said claim has been allowed or not, but which has not been paid

(1) But in the absence of any express statutory provision on the subject, section 6 of the statute of limitations of 1831 is to be construed so as to cover certain cases under the administration act; and therefore, where a claimant commences suit within six months after the rejection of his claim by the executor or administrator, and after the expiration of six months he is nonsuited or recovers a judgment, which is subsequently reversed, he may commence another action within six months from the happening of either of those events. *Haymaker's Ex'r v. Haymaker*, 4 Ohio St. 272. See also *Keenan v. Saxton's Adm'rs*, 13 Ohio, 41.

in full, and shall enter into an undertaking (139), with sufficient surety, to be approved (147) by the probate judge, conditioned to pay all costs and expenses of contesting such claim, in case it shall be finally allowed, such claim must, in such case, be disallowed and rejected by such administrator or executor, and the holder of such claim must be required, within six months after such rejection of such claim, to bring his action against such administrator or executor, to enforce such claim, and if he recover, the judgment must be against the said administrator or executor; and in such action, such heir, creditor, or other person claiming to hold such property, must be made a party defendant with such administrator or executor, and shall have the right to plead and make any defence to such action which such administrator or executor could make; whenever such written requisition and undertaking shall be so filed in the probate court, the probate judge must at once notify¹ such administrator or executor thereof (140); and such administrator or executor must thereupon at once notify (141) the holder of such claim that such claim is rejected and disallowed; and if the proceedings shall have been commenced to sell the lands of such decedent to pay such claim, such proceedings must be stayed, and no further order or decree taken therein, until after the validity of such claim shall have been determined, and if the plaintiff recover, the judgment shall be against the administrator or executor, but the costs must be awarded against the party filing the requisition to disallow the claim.^a

No part of the assets of the deceased can be retained by an executor or administrator, in satisfaction of his own debt or

(1) The law does not specify *how* the probate judge shall notify the administrator or executor. Therefore the judge may, under the authority granted him in the general provisions of the title regulating the procedure in probate courts, give such notice in such way as he may deem reasonable. See page 219, in Chapter XIV.

A notice, in substance like Form 140 sent by mail to the usual post-office address of the executor, would probably be sufficient; yet the better way would be to serve such notice by sheriff or specially authorized person, in the same way that citations are served.—ED.

(a) § 6098.

claim, until it shall have been proved to (91) and allowed by the probate court; and such debt will not be entitled to any preference over others of the same class.^{1 a}

When such executor's or administrator's claim amounts to less than fifty dollars, perhaps the best and most convenient method of proceeding is to file the same, duly proved as in other cases (91), with the other vouchers of his account; and unless objected to by some person interested in the estate, or rejected by the probate judge, for want of sufficient proof of its validity, the same will stand as a proper credit in the account, as for so much money paid by the executor or administrator.

If such claim amount to fifty dollars or more, its owner must proceed as directed in the three following paragraphs.

Whenever an executor or administrator shall present to the probate court for its allowance, any debt or claim of which he is the owner, against the estate which he represents, amounting to fifty dollars or more, the court must fix a day, not less than four nor more than six weeks from the presentation of said debt or claim, when the testimony touching said debt or claim shall be heard; and the court must forthwith issue an order (142) (143), directed to said executor or administrator, requiring him to give notice in writing to all the heirs legatees, or devisees of said decedent interested in said estate, and such creditors as are therein named, which notice (144) must contain a statement of the amount claimed, and designate the time fixed for hearing the testimony, and must be served upon the persons named in said order at least twenty days before the time fixed for such hearing; and if any of the persons mentioned in said order are non-residents of the county, service of said notice may be made upon them by publication (145) for three consecutive weeks in a weekly newspaper, published for circulating in said county; all

(3) And where a creditor is appointed administrator of his debtor's estate, and dies without receiving assets, it is not to be assumed that his debt is paid, but *his* administrator may maintain an action against the administrator *de bonis non* of the estate of the deceased debtor to recover the amount due. *Jewett's Adm'r v. Jewett, Jr.'s, Adm'r*, 5 Ohio, 72.

of the persons named in the order shall be deemed parties to the proceeding; and any other person having an interest in the estate, may come in and be made a party thereto.^a

The words, "shall *forthwith* issue an order directed," etc., seem to imply that the probate judge shall give the order directly to the executor or administrator, while the latter, in person or by attorney, is present in court presenting his claim. Such a course would at least be a strict compliance with the law and good practice. As the law requires the executor or administrator to "give notice in writing to all the heirs," etc., and that such notice "shall be served upon the *persons* named in said order," it is doubtful whether such notice sent by mail, or left at the residence of the person to be served, would be sufficient; and a person so served could probably obtain a rehearing of the claim if he stated on affidavit that he did not receive the notice. No proof of the service of such notice, either on the person or by publication, seems to be required by the law; but the courts will probably, in some counties at least, require such proof. Whether required or not, it would be good and safe practice to make and file an affidavit concerning the notices served in person (144), and another concerning those served by publication. The affidavit concerning publication may be in the same form as the one in case of petition for sale of lands to pay debts, except that the words "*six weeks*" should be changed to "*three weeks*" (71).

Upon the hearing as to the allowance of said debt or claim by the said court, exception may be taken to any decision of the court upon any matter of law, by any person who may be affected thereby, and bills of exception may be taken and allowed, and proceedings in error had after a final order or judgment, as is, provided in other cases; and an appeal may be taken to the court of common pleas of the proper county from any order or judgment of the probate court allowing or disallowing such debt or claim, or any part thereof, by any person who may be affected thereby, when the amount claimed by such executor or administrator exceeds one hundred dollars; and the matter so appealed must be tried, heard, and decided in said common pleas court in the same manner, and the proceedings therein shall be the

(a) § 6100.

same, as nearly as may be practicable, as if the said common pleas court had original jurisdiction thereof, but without pleadings, unless pleadings be ordered by the court to be filed; the person so appealing must, within twelve days after the making of such order of judgment, give a written undertaking (146) to the state, for the use of the persons who may be interested therein, with one or more sureties to be approved by the probate judge, conditioned that the person appealing shall pay all costs which may be awarded against him in the appellate court, and the bond must be in such amount as the probate judge may prescribe.^a

In the foregoing proceedings concerning contested claims of executors and administrators, such executors and administrators can only testify in their own behalf in the exceptional cases specified by statute. The law governing such cases, in so far at least as concerns executors and administrators, is fully set forth in Chapter XIV., Section I., of this volume.

In case a decedent, in his lifetime, was one of the makers of a joint contract, or should a judgment have been rendered against him upon such joint contract previous to his death, his estate will be liable therefor, as though such contract had been joint and several, or as though such judgment had been against him alone.¹ But this provision of law will not affect the rights of a surety, when certified as such, in a judgment rendered against him and his principal jointly.^b

Légal proceedings can not be had to charge a decedent's estate without the appointment of an administrator;² and in a suit

(1) Under the provisions of the 38th and 371st sections of the code, and the 9th section of the law relating to the settlement of the estates of deceased persons, the surviving obligor or obligors in a joint contract may be joined with the personal representatives of a deceased obligor, in an action upon such contract, and a several judgment can be rendered against each, according to the nature of their respective liabilities. *Ludlow's Adm'r et al. v. Ohio Life Ins. and Trust Co.*, 5 Ohio St. 586.

(2) *Piatt v. St. Clair's Heirs et al.*, 4 Ohio, 555; *Bustard v. Fowler's Adm'r et al.*, 5 Ohio, 68. And a suit against the estate of the decedent can not pro-

(a) § 6101.

(b) §§ 6102, 6103.

against the administrator of an estate, a claim against the estate arising after the death of the decedent, may be joined with one which existed before his death.¹

A debt not due may be paid by the executor or administrator, according to the class to which it belongs, upon discount by the creditor of the interest upon the amount paid, for the unexpired time, if the claim do not bear interest before maturity.^a

No execution can issue upon a judgment against an executor or administrator except by order of the court which appointed him, until the expiration of the eighteen months allowed by law, and such further time as the court may have allowed him to collect the assets of the estate; and if an account has been rendered to and settled by the court, execution can only issue for the sum that on the settlement of such account appears to be the just proportion of the assets which should be applied toward the satisfaction of the judgment.^b

In suits for the recovery of money only, or of specific personal property against the estate, in which no provision is made herein in relation to costs, no costs can be recovered against the executor or administrator, to be levied of his property or of the property of the deceased, unless it appear that the demand on which the action was founded, was presented within one year after his giving bond for the discharge of his trust, that its payment was unreasonably resisted or neglected, or that the defendant refused to refer the same, pursuant to the preceding provisions;² in which case the court may direct such costs to be levied of the property of the defendant, or of the deceased, as shall be just, having reference to the facts that appeared on the trial.^c

All executions against executors and administrators, for debts due from the deceased, must, except in the cases otherwise provided for herein, run against the goods and estate of the deceased in their hands, and not against the private property of

ceed after the death of an administrator, until a new administrator is appointed and made a party. *Piatt v. St. Clair's Heirs et al.*, 5 Ohio, 555.

(1) *Howard's Adm'r v. Powers*, 6 Ohio, 92.

(2) See pages 107-109.

(a) § 6104

(b) § 6105.

(c) § 6106.

the executor or administrator; and when any execution against an executor or administrator, for a debt due from the estate of the deceased, is returned unsatisfied, the creditor may bring an action, upon a suggestion of waste, against the executor or administrator, and if the defendant shall not show to the contrary, he will be deemed guilty of waste, and shall be personally liable for the amount of such waste, when it can be ascertained; and if the amount of such waste can not be ascertained, the said executor or administrator will be liable for the amount due on the original judgment, with interest thereon, from the time when it was rendered, and judgment and execution shall be awarded accordingly, as for his own debt.^a

No suit can be maintained against an executor or administrator, by a creditor of the deceased, until after the expiration of eighteen months from the date of his administration bond, and until after the expiration of any time allowed him for the collection of the assets of the estate, unless it be for the recovery of a demand that would not be affected by the insolvency of the estate; or unless it be brought upon a claim concerning which there is some contest or dispute, or which has been rejected by the executor or administrator.^{1 b}

(1) A suit can not be maintained against a decedent's estate within eighteen months from the date of the administration bond, unless the claim upon which suit has been brought was presented, duly authenticated, to the executor or administrator, and he refused to indorse an allowance thereon. *Keenan v. Saxton's Adm'r*, 13 Ohio, 41.

In an action brought on an administrator's bond, against the surviving obligors, and the administratrix of the estate of a deceased surety, the plaintiff assumes, as to such administratrix, the character of a *creditor* of her deceased husband's estate; and when the case does not fall within any of the exceptions provided for in the ninety-eighth section of the administration act, such action can not be maintained against the administratrix until the expiration of eighteen months from the date of the administration bond. *Hammerle v. Kramer's Adm'r*, 12 Ohio St. 252.

Upon the death of a debtor, his estate, of whatever description, stands for the payment of all his general creditors alike; and one creditor can not by superior diligence acquire a superior right to any part of the estate. *McDonald et al. v. Aten et al.*, 1 Ohio St. 293.

But the exemption of an executor or administrator from suit for eighteen

(a) § 6107.

b, § 6108.

When liens exist upon the real estate of a decedent, and there are personal assets in the hands of the executor or administrator sufficient to pay the same, it is his duty to satisfy such liens, unless it be otherwise provided by the will of the decedent.¹ Nor is the person holding such lien, generally, bound to look to the real estate for payment, but may claim satisfaction of the same out of the personal estate, with other creditors of the same class.

An executor or administrator may, at the expiration of one year from the time of giving notice of his appointment, and in case the assets in his hands are sufficient for the payment of all the claims against the estate which have come to his knowledge,² proceed to pay the ordinary debts of the decedent, and he will not be personally liable, in consequence of such payments, to any creditor who may subsequently present his claim, in case the remaining assets should not be sufficient to satisfy such claim.^a

In case an executor or administrator should pay away, in the months from the date of his bond, and until after the expiration of the time allowed him to collect assets, does not apply to suits brought upon his bond for a breach thereof. *Greer et al. v. Ohio use of Greer*, 2 Ohio St. 574.

When the debt of a creditor has been allowed, and when the executor or administrator has funds in his hands applicable to its payment, if the estate be solvent, the creditor is by law entitled to payment within the eighteen months from the date of the administration bond, and if not paid, he may, at the expiration of that period, upon demand made, bring suit upon the bond, and recover, notwithstanding further time has been given to collect the assets of the estate. *Ib.*

This paragraph (being in substance old Section XCVIII. of the act of March 23, 1840, but re-enacted and now in force) does not apply to proceedings to revive an action before judgment, against the personal representative of a deceased party (and if it did apply it would be too late to object after appearance and trial). *Musser v. Chase*, 29 Ohio St. 577.

(1) *Welsh et al. v. Perkins et al.*, 8 Ohio, 52; *Thompson's Adm'r v. Thompson et al.* 4 Ohio St. 333.

(2) In *Bank of Muskingum v. Carpenter's Adm'r's et al.*, 7 Ohio (pt. 1), 21, 70, it was held that if an administrator has notice of a claim against the estate by a writ of *scire facias*, sued out upon it, he is not justified in distributing the assets of the estate among the other creditors, without regarding such claims, although no special demand of payment was made.

(a) § 610J.

manner just mentioned, the entire estate and effects of the decedent, before receiving notice of the existence of any other claims against the estate, he will not be required to represent the estate as insolvent after receiving notice of such further claims; but in case suit should be brought against him thereon, may plead that he has fully administered; and, upon proving that the entire estate was legally applied to the payment of the debts presented within the year, will be entitled to a discharge.^a

Should the executor or administrator have paid away, in liquidation of claims presented within the year, so much of the estate and effects of the decedent that the remainder will be insufficient to satisfy any demand of which he may afterward receive notice, he is required by law to pay on such last-mentioned claim only the balance of the estate in his hands; and if two or more claims be presented after the expiration of the year, which together exceed the balance of the assets remaining in his hands, he may represent the estate to the court as insolvent, and pay over to the creditors who prove their claims under the commission of insolvency, their respective proportions of such balance, in accordance with the order of the court with reference thereto.^{1 b}

Creditors previously paid in full within the year can not be compelled to refund any portion of the several amounts received by them, on account of the presentation of such dilatory claim.^b

But if the entire estate has been paid away in settling the preferred claims, the estate need not be represented insolvent, no

(1) It will be observed that there is a contingency which may arise under this branch of the law, that is not provided for. The law seems to presume that ALL the creditors who presented their claims within the year have been paid before the executor or administrator receives notice of subsequent claims, and therefore directs him to pay on such subsequent claims "only so much as may then remain in his hands." Suppose, however, that when he receives notice of the existence of other claims, he has paid only a portion of the creditors whose claims were proved within the year, and that he still has in his hands the money with which he intends to pay the residue of such diligent creditors, can those who presented their claims after the expiration of the year claim a *pro rata* share of all the assets remaining in the hands of the executor or administrator, including that portion with which he intends paying the diligent creditors?

(a) § 6110.

(b) § 6111.

matter how many unpreferred claims are presented; and in any action against the executor or administrator on such unpreferred claims, this fact can be pleaded and will be a complete defense.¹

Should the executor or administrator have given notice of his appointment, according to law, a suit can not be maintained against him, by a creditor of the decedent, after the expiration of four years from the date of the administration bond,² except in the following cases:

First. When assets subsequently come into his hands, in which case he must account for and apply the assets so received in like manner as if received within four years; and he will be liable to be proceeded against by or for the benefit of creditors, on account of such newly-received assets, as if the same had come into his hands within the four years; provided, however, that such action or proceeding be commenced within one year from the time when the creditor receives notice of such addi-

(1) As to what are preferred claims, see first few pages of this chapter.

(2) Although further time be allowed an administrator to collect the assets of an estate, suit must still be brought upon claims against the estate, within four years from the date of the administration bond. *Gilbert's Adm'r v. Little's Adm'r*, 2 Ohio St. 156. Where a creditor takes from his debtor a note, and also a mortgage on real estate to secure the same, and the debtor afterward dies, and an action against his personal representative becomes barred by the lapse of time, under section 103 of the administration act: *Held*, that the creditor may, nevertheless, have his remedy in equity on the mortgage. *Fisher's Ex'r v. Mossman et al.*, 11 Ohio St. 42. Where a devisee or legatee accepts a devise or bequest charged by the will with the payment of the debts of the testator, the law imposes on the devisee or legatee a personal obligation to pay such debts; and in an action to enforce such personal obligation, the fact that the devisee or legatee is or is not also executor of the will makes no difference in the case. In such case the statute limiting actions against executors and administrators to four years does not apply. *Fuller v. McEwen*, 17 Ohio St. 288. The four years' limitation applies to an action instituted on a guardian's bond; and the disability of infancy will not save the plaintiff from the operation of the statute. *Favorite v. Booher's Adm'r*, 17 Ohio St. 548.

(a) § 6112.

tional assets, and not more than four years after they are actually received.¹

Second. When a claim against the estate does not become due, or a cause of action does not accrue thereon until after the expiration of the four years. In such case, if the estate has not been previously fully administered, suit may be brought against the executor or administrator within one year after the accruing of the cause of action, and before the estate is fully administered.^{2a} Any creditor whose right of action does not accrue within the four years may, at any time before the expiration of that time, present his claim to the probate court (61) from which letters issued; and if, on examination, the claim appears to be just and valid, the court may, with the consent of the executor or administrator, order (62) that such claim be paid and discharged at once, after discounting the legal interest upon the same for the unexpired time; or may order the executor or administrator to retain in his hands a sufficiency of assets to satisfy such claim after the same may become due; or, if the heirs, devisees, or others interested in the estate, offer to give bond (63) to such creditor, with sufficient sureties, for the payment of the claim when the same becomes due, in case it shall be proved to be valid, the court may, at its discretion, order (62) such bond to be taken, instead of ordering a payment of the claim or a retention of the assets in the manner just referred to.^b

The decision of the court thereon shall not be conclusive against the executor or administrator, or other person interested to oppose the allowance thereof; and they shall not be compelled to pay the same, if disputed by them, unless it shall be

(1) *Gilbert's Adm'r v. Little's Adm'r*, 2 Ohio St. 156; *Mattoon v. Clapp's Heirs et al.*, 8 Ohio, 248.

Money arising from the sale of land possessed by the decedent at the time of his death, and sold for the payment of debts, and money received by the administrator from the guardian of the heirs of the intestate under an arrangement made to save their lands from sale, are not *new assets*, and will not extend the four years' limitation within which creditors are required to sue. *Favorite v. Booher's Adm'r*, 17 Ohio St. 548.

(2) *Gilbert's Adm'r v. Little's Adm'r*, 2 Ohio St. 156.

(a) §§ 6113, 6114.

(b) § 6115.

proved to be due, in an action to be commenced by the claimant, within six months after the same shall become payable.^a

The action for this purpose must be brought against the executor or administrator, in case he shall have been required to retain assets therefor, or ordered to pay the same; but if the heirs or others interested in the estate shall have given bond, as before provided, the action must be brought on the bond.^b

If the action be brought on the bond, the plaintiff shall set out his demand as in an action against the executor or administrator, alleging the liability of the defendants by reason of the bond, and the defendants may plead any defense that would be available to the executor or administrator.^c

Nothing herein contained shall prevent or bar the action or suit of any creditor, against the heirs, next of kin, devisees, or legatees of the deceased, as herein provided.^d

When any executor or administrator shall die, resign, or be removed, or his letters shall have been revoked, or his powers shall have ceased, without having fully administered the goods and estate of the deceased, and a new administrator of the same estate must be appointed, the time allowed to the creditors of the deceased, for bringing their actions, will be enlarged as follows: To so much of the four years, provided for the limitation of such actions, as shall have expired while the former executor or administrator continued in office, will be added so much time after the appointment of the new administrator, as will make five years in the whole; and the new administrator can not be held to answer to the suit of any creditor, commenced after the expiration of the said five years, except as is provided in the following ten paragraphs: ^e

Every such new administrator will, in all cases, be liable to the actions of the creditors, for the space of two years after he shall have given bond for the discharge of his trust, although the whole time allowed to the creditors should be thereby extended beyond the five years.^f

In case the former executor or administrator failed to give no-

(a) § 6116.

(b) § 6117.

(c) § 6118.

(d) § 6119.

(e) § 6120.

(f) § 6121.

notice of his appointment, as required by law, suits may be brought by the creditors against such new administrator (or administrator *de bonis non*), at any time within four years from the date of his bond.^a

The new administrator (or administrator *de bonis non*) is required to give notice (11) of his appointment in like manner as an original administrator; and if he fail to do so, he will not be entitled to exemption from suit upon the expiration of any of the periods limited by law for bringing the same.^b

Nothing contained in the four preceding paragraphs shall be so construed as to revive a claim barred under this or any other act during the continuance in office of the original executor or administrator, or of any former administrator *de bonis non*.^c

Should an administrator *de bonis non* receive assets after the expiration of any of the periods fixed by law for the commencement of suits, he must account for the same, and will be liable to suit on account of such new assets, in like manner as though he were an original administrator. But the appointment of an administrator *de bonis non*, and the receipt of assets by him, will not revive any claim barred, as mentioned in the preceding paragraph.^d

If notice of the appointment of any executor or of any original administrator, or administrator *de bonis non*, shall not be given within the three months, or the evidence thereof shall fail to be perpetuated, as directed on page 62, and can not be made, the court may, on the petition (64) of the executor or administrator, order (65) and allow such notice to be given at any time afterward, in which case the said four years and other periods of time, which are hereinbefore limited for the commencement of actions against executors and administrators, and for other purposes, and which begin to run as before directed, from the date of the administration bond, shall begin to run respectively, from the time such order of court is made, if notice be published according thereto.^e

The order of the court authorizing the giving of such notice will not exempt the executor or administrator, or their respec-

(a) § 6122.

(b) § 6123.

(c) § 6124.

(d) § 6125.

(e) § 6126.

tive sureties from their liability for any damages, for which they would have been otherwise liable, by reason of the omission to give notice within the said three months.^a

A legacy is not a privileged claim, and a legatee is not entitled to payment until all the privileged claims and ordinary debts existing against an estate have been paid. A man can not by will so dispose of his property as to deprive his creditors of the *first* claim upon *all* his estate.¹ But when any executor or administrator shall, within four years after having given bond for the discharge of his trust, be required, by any legatee or next of kin, to make payment in whole or in part, of his legacy or distributive share, the court may, if it thinks fit, require (59) that the legatee or next of kin, first give bond (58) to the executor or administrator, with surety or sureties, to be approved by the court (147), with condition to refund the amount so to be paid, or as much thereof as may be necessary to satisfy any demands that may be afterward recovered against the estate of the deceased, and to indemnify the executor or administrator against all loss and damage on account of such payment.^b

But where there are doubts as to the sufficiency of the assets to pay the debts and legacies, an executor can not be compelled to pay a legacy within four years from the date of his bond, even though the legatee should tender him a bond of indemnification.

Subscriptions of a decedent in his lifetime toward the building of churches, bridges, or other public edifices, works, or enterprises, or to public charities, or for the support of ministers of the gospel, if unpaid at the time of his death, are debts of his estate, and entitled to payment like other claims against the same.²

When the decedent in his lifetime was a member of a firm which failed in business, and was unable to pay its debts, the creditors of the firm are not entitled to satisfaction of their claims out of the private estate of the decedent until after his personal creditors have been paid; nor can the personal creditors of the

(1) See notes, pp. 4 and 5, and note 1, p. 153.

(2) *Commissioners of the Canal Fund v. Perry*, 5 Ohio, 56.

decedent claim any portion of the assets of the firm of which he was a member, until the partnership debts have been paid.¹

But where there are no assets of an insolvent firm to apply to the payment of their debts, and there is no living solvent partner, the partnership debts have an equal claim upon the property of the deceased partner with his own private debts of the same class.²

An executor or administrator is not bound by law to pay any debts of the decedent which have become barred by the statute of limitations.³ Therefore, if a book account against the decedent, of more than six years' standing, and upon which he made no payment within six years previous to the time when the same is presented to the executor or administrator for payment³ or a note, bond, due-bill, contract, or any other instrument of writing for the payment of money, executed by the decedent in his lifetime, which has been due for more than fifteen years, and upon which no payment has been made within fifteen years, should be presented to the executor or administrator, he is not only released from the payment of such claim, but it is his duty actually to reject the same.

The statute of limitations does not cease running upon the death of a decedent,⁴ nor does it make any difference that a claim became barred after his death; it must have been presented to and allowed by the executor or administrator, or, if rejected by him,

(1) *Rodgers v. Meranda et al.*, 7 Ohio St. 179; *Grosvenor et al. v. Austin's Adm'rs*, 6 Ohio, 103; *Sumner v. Hampson et al.*, 8 Ohio, 328; *Commercial Bank v. Western Reserve Bank*, 11 Ohio, 444. Where one of several partners dies, his administrator may sell his interest in partnership lands, but the purchaser takes it subject to the rights of partnership creditors. *Green v. Graham et al.*, 5 Ohio, 264.

(2) *Grosvenor et al. v. Austin's Adm'rs*, 6 Ohio, 103; *Rodgers v. Meranda et al.*, 7 Ohio St. 179.

Where one of two partners is deceased, and the other insolvent, a surety for the firm, having paid the debt, may proceed in equity against the estate of the deceased partner, without prosecuting a suit against the survivor. *Horsev v. Heath, Jr., et al.*, 5 Ohio, 353.

(3) See note 2, p. 337.

(4) *Granger's Adm'r v. Granger*, 6 Ohio, 35; *Coventry v. Atherton*, 9 Ohio, 34. See pp. 89, 111.

suit must have been brought thereon before the limitation expired, or it is forever barred. No act of an executor or administrator can revive a claim against the estate of a decedent when once barred by the statute of limitations.¹ But the allowance or part payment of a debt by the executor or administrator, before the expiration of the statute, will save it from being barred.²

An executor or administrator should be very careful to take receipts (60), *in all cases*, for payments made in behalf of the estate.³ He is required by law to produce vouchers, on the settlement of his account, for all claims, of every character and grade, paid by him; and although the probate judge is authorized to allow him, without vouchers, and upon his own affidavit of payment, any claims not exceeding ten dollars each, nor two hundred dollars in the whole, which he may have paid, yet the only safe and reliable method of providing against the many contingencies that may arise, is to require a voucher for every payment made, without exception.

It is sometimes supposed that it is not necessary to take a receipt upon a note or a sworn account against the decedent, and that such claims prove themselves. But in this there is great error. What is required of an executor or administrator, upon settlement of his account, is to show that *he* paid the debts for which he claims credit; and the mere fact that he has the note or sworn claim in his possession at the time of the settlement, is no evidence that *he* paid them. As before remarked, there is no exception to the general rule—receipts should be taken for every payment made.

The receipt or voucher should state specifically the amount and the nature of the claim paid. If it be a note, book account,

(1) See *Drouillon v. White's Adm'r* (Gallia District Court), reported in No. 11 W. L. J. As to how far the admissions of an executor or administrator will bind an estate, see *Hueston's Adm'r v. Hueston*, 2 Ohio St. 488; and *Mattoon v. Clapp's Adm'r et al.*, 8 Ohio, 248.

(2) *Executors of Niemcewicz v. Dayton's Adm'r*, 13 Ohio, 271; *Coventry v. Atherton*, 9 Ohio, 34.

(3) For suggestions relative to receipts where there are counter-claims of the estate, and a balance is received or paid by the executor or administrator, see *ante*, Chapter V., Section I.

fees of appraisers, clerk, or auctioneer ; or for the coffin, digging the grave, widow's allowance, or other claim, the receipt should mention particularly the purpose for which the payment was made, and how much was paid (60).^a

It is not obligatory upon an executor or administrator to erect tombstones at the grave of the deceased ; but the probate judge may, at his discretion, allow any reasonable sum expended for that purpose, when settling the account of the executor or administrator.^b

Executors, administrators, and certain other trustees may, when they have funds belonging to the trust which are to be invested, invest the same in the certificates of the indebtedness of this state or of the United States, or in such other securities as may be approved by the court having control of the administration of the trust ; and whenever money coming into their hands is stopped therein, by litigation or other lawful cause, and the same will probably be so detained for more than six months, they may invest the same during such detention, in the same manner that trust funds are now authorized by law to be invested, or in such other manner as the probate or other court having jurisdiction of the matter may direct.^c

If an executor or administrator shall have paid all the debts of the estate, without disposing of all the notes, bonds, stocks, claims, and other rights in action, belonging to the estate, he may with the approval of the probate court, entered on the journal at or after the settlement of the estate, and with the assent and agreement of the persons entitled to such assets as distributees, or otherwise, distribute and pay over the same in kind to those of such persons as will receive the same ; and such distribution will have the same force and effect as the distribution of the proceeds of such assets.^d See further, 77 O. L. 77.

The assent above mentioned **may** be verbal, but the better and safer practice would be to have it in writing (148), attached to the final settlement, or filed unattached among the papers of the case. A receipt (149), describing the note, etc., and stating the amount for which it is accepted, should be taken from the person receiving it, and filed as a voucher.

Should an executor or administrator, without express authority to do so, carry on the business of the decedent for the pur

(a) §§ 6183, 6184.

(b) § 6185.

(c) § 6431. See p. 176.

(d) § 6189. See also 77 O. L. 77.

pose of paying the debts of the estate, supporting the widow and children of the decedent, and keeping up the business for the minor sons, when they should be old enough to take charge of it, or for other equally commendable purpose, he would do so entirely at his own personal risk, no matter how good his intentions might be.¹ The law defines his duties, and he must obey it.

(1) *Lucht, Adm'r v. Behrens*, 28 Ohio St. 231.

A provision in a will of a partner for the continuance, for a certain time, of the partnership business, does not authorize the executor to invest further funds in that business, nor does it suspend the settlement of the assets of the estate not invested in the business, or which do not become so by the authority of the will. (*Lawrence Com. Pleas*, 1861.) *Peters v. Campbell*, 3 W. L. M. 587.

Where the deceased had, shortly before his death, subscribed \$5,000 to the capital, not to exceed \$50,000, of a joint stock company, and afterward directed by his will that such stock should be allowed to remain for five years, and, after his death, his executor consented to a change in the original articles, introducing new partners and increasing the capital of the company to \$70,000, and at the end of five years the company was in debt far beyond its capital, the estate of the deceased is not liable for any proportion of the deficiency beyond the \$5,000 subscribed and paid in. *Ib.*

Where the continuance of a firm after the death of a partner is provided for by will, the residue of his estate, not involved in the partnership business, does not become liable for debts of the partnership accruing after his death, unless clearly made so by the provisions of the will. *Ib.*

See also *Gandolfo v. Walker*, 15 O. S. 251; *Ib.* 2 4.

CHAPTER VII.

RELATING TO THE SALE OF REAL ESTATE FOR THE PAYMENT OF DEBTS.

SECTION I.

HOW AND WHEN AN ORDER OF SALE MAY BE OBTAINED ; THE PROCEEDINGS UNDER THE SAME ; THE DEED OF THE EXECUTOR OR ADMINISTRATOR, ETC.

It is the duty of an executor or administrator, as soon as he discovers that the personal estate in his hands will be insufficient to pay the claims against the estate of the decedent, to apply to the proper court for authority to sell the real estate of the decedent.^{1 a}

An executor authorized by will to sell real estate is not required to obtain an order of the court to make such sale ; but may sell and convey the premises in accordance with the terms and directions of the will.^{2 b}

(1) In case of a deficiency of personal assets to pay taxes, an executor or administrator may apply for an order to sell lands for that purpose. *Welsh et al. v. Perkins et al.*, 8 Ohio, 52. An allowance for the support of the widow and children of a decedent is a *debt* of the estate, for which real estate may be sold. *Allen v. Allen's Adm'r*, 18 Ohio St. 234. And in case there should not be sufficient personal estate to pay a legacy of the decedent, together with the privileged and ordinary claims against the estate, the executor or administrator may apply for an order to sell real estate to pay such legacy.

See p. 181 ; also p. 4, last paragraph, and notes referred to in it.

(2) But where no authority exists by will to sell real estate, an executor can not in any case make sale of lands by private contract, nor without first obtaining an order of court to sell. *Lessee of Goforth v. Longworth*, 4 Ohio, 129. See also *Ludlow's Heirs v. Park*, 4 Ohio, 5.

A power given to executors by will, to sell and convey land, becomes le-

(a) § 6136.

(b) §§ 5980, 6167.

It is frequently the case that an executor or administrator will defer applying for an order to sell the real estate of a decedent until the personal assets have been exhausted. This is a direct violation of the requirements of the statute. The law directs that such application shall be made as soon as the necessity for doing so has been ascertained. In most cases an executor or administrator will discover, within a few months after his appointment, whether a sale of real estate will be necessary for the payment of debts; and immediately upon such discovery being made, he should take measures¹ for having the real estate sold, in order to avoid delay in the settlement of the estate, and to give creditors their dues, and save interest upon the claims against the estate.

In order to obtain such authority to sell, the executor or administrator must commence a civil action in the probate court or court of common pleas of either the county in which the real estate of the deceased, or any part thereof, is situate, or of the county in which his letters testamentary or of administration were issued.^a In most cases the county in which letters issued is preferable, as it is desirable to have the entire record of all the proceedings connected with the settlement of an estate in one county.

As the probate court is always open for the transaction of business, and the proceedings connected with the sale of real estate can be more speedily conducted and terminated in that court than in the court of common pleas, it is advisable, except in cases where difficulties exist in relation to title, or severe litigation be-

gally inoperative, and ceases to exist when the estate is settled, or all claims against it are presumptively satisfied by lapse of time, and no object of the testator remains to be attained. *Ward's Lessee v. Barrows*, 2 Ohio St. 241.

The levy of an attachment in an action against a devisee will not defeat or prevent the execution of a power of sale given by a testator to his executor, nor will such levy affect the title of the purchaser at the executor's sale. *Smyth v. Anderson*, 31 Ohio St. 144. See also note 1, p. 39.

(1) As to the effect of bringing action for this purpose under the now obsolete code, and charging incumbered lands with the payment of debts, see *Calkins v. Johnson*, 20 Ohio St. 539.

(a) § 6137.

tween rival lien-holders is anticipated, to bring the action¹ in the probate court.

A civil action must be commenced by filing in the office of the clerk of the proper court a petition (66), and causing a summons to be issued thereon.^a

If the executor or administrator, who shall commence such action, for the sale of real estate, shall die, resign, or be removed, or his powers shall cease at any time before the conveyance of the same, under an order of the court, the administrator *de bonis non* must proceed with such sale, and may convey the land sold before or after his appointment, and may be required to give an additional bond (150), in like manner as if such administrator *de bonis non* had filed the petition.^b

The real estate of a decedent subject to sale for the payment of his debts, includes all lands or town lots by him held in fee simple, as well as any equitable interest in such property of which he may have died possessed. Also, permanent leaseholds, and any real estate he may have conveyed in his lifetime for the purpose of defrauding his creditors; also, any real estate, held by the executor or administrator upon the foreclosure of a mortgage in favor of the estate; also, any interest of the decedent in real estate held by him and others in common; as well as all other permanent rights and interests which the decedent in his lifetime held in any lands, tenements, or hereditaments.³

Where lands have been fraudulently conveyed by a decedent in his lifetime, and are subsequently purchased of the grantee in good faith and for a valuable consideration, by a person having no knowledge of the fraud, the title of such *bona fide* pur-

(1) As to the method of bringing a civil action, see 130-140.

(2) This provision of law is in contravention of the rule of common law, which makes deeds made to defraud creditors good between the parties to such deeds. In *Benjamin v. Le Baron's Adm'r*, 15 Ohio, 517, it was held that an administrator can not maintain an action of trover to recover goods transferred by his intestate to defraud creditors. But in *Kilbourne v. Fay*, 29 Ohio St. 264, 280, this seems to be doubted.

(3) When one of several partners dies, his administrator may sell his interest in partnership lands, but the purchaser takes it subject to the rights of partnership creditors. *Green v. Graham et al.*, 5 Ohio, 264.

chaser will be protected, and the executor or administrator of the person making the fraudulent conveyance, will be precluded from claiming the lands in behalf of the estate.^a

The right to reclaim lands fraudulently conveyed will be lost unless asserted within four years from the death of the grantor.^a

If land is to be included in such action which has been so fraudulently conveyed, the executor or administrator may either before or at the same time, bring an action for the recovery of the possession of such land; or he may in his action for the sale thereof allege the fraud and have the fraudulent conveyance avoided therein; but when such land is included in the application before a recovery of its possession, the action must be in the court of common pleas.^{1 b}

In order to satisfy the court that a sale of real estate is necessary for the payment of debts, the petition (66) of the executor or administrator must state the amount of the debts of the decedent, as near as can be ascertained, the probable amount of the costs and expenses of administration, and the value of the personal estate and effects according to the inventory. The petition must also contain a full description of the real estate sought to be sold; and if an appraisement of the same was made by the appraisers of the personal estate under an order of the court, the amount of such appraisement must be given.^c

In such action the widow of the deceased, and the heirs, devisees, or persons having the next estate of inheritance from the deceased,² and all mortgagees and other lien holders, whether by judgment or otherwise, of any of the lands sought to be sold, and all trustees holding the legal title thereto or to any part thereof, must be made parties to the action; and when a fraudulent conveyance is sought to be set aside in such action, all persons holding or claiming thereunder must also be made parties.^d

When the real estate in any application for an order of sale is

(1) See note 1, p. 129.

(2) Although it is not generally necessary that the wives of male heirs should be made parties to the action, yet the circumstances may be such that they should be, and it would be prudent practice to make them such in every case. But the husbands of female heirs must always be made parties.

(a) § 6139.

(b) § 6140.

(c) § 6141.

(d) § 6142.

inumbered by mortgage or judgment liens, liens for purchase money, or other liens, the common pleas and probate courts in which the action is pending are fully empowered by law to determine the equities between the parties, and the priorities of the several liens, and to order a distribution of the avails of a sale accordingly.^a

Such order of distribution may be made at the time when the sale is approved, or at any previous time; or the order determining the priority of the liens may be made at any time previous to the sale, and the order of distribution subsequently.

The petition should set forth, when so, that it is necessary to sell some part of the real estate, and that by such sale the part sold or the remainder would be injured.^b

If there should be in the last will of the deceased any disposition of his estate for the payment of his debts, or any provision that may require or induce the court to marshal the assets, in any manner different from that which the law would otherwise prescribe, such devises, or parts of the will, must be set forth in the petition, and a copy of the will must be exhibited to the court; and the assets will be marshaled accordingly, so far as it can be done consistently with the rights of the creditors.^c

When a petition is filed for the sale of an equitable estate, or any equitable interest, which the deceased held in any lands, the executor or administrator must set forth in the petition the nature of such equitable estate or interest, making all necessary parties, including the persons holding the legal title thereto and those who are entitled to the purchase money therefor; and the court may, in such case, notwithstanding any other provisions of this chapter, make such order for the appraisal and sale of such equitable estate, for the indemnity of the estate of the deceased against the claim for such purchase money, and for the adjustment of the dower of the widow of the deceased, in such equitable estate, by estimating and directing to be paid to her the value of a life annuity¹ in one-third of such equitable estate

(1) This value is generally calculated by the annuity tables in common use by life insurance companies, etc. See p. 331. As to dower, see pp. 141 et seq., and notes 18-33, pp. 340, 341.

(a) § 6145.

(b) § 6149.

(c) § 6152.

or otherwise, as it may deem just and right, between all parties in interest.^a

For the foregoing reasons, the petition should contain a statement of the mortgages,¹ judgments, vendor's liens, or other liens existing against such real estate, if known to the petitioner; and if there be any questions relating to the title of the decedent, whether growing out of trusts, equities, or any other matter, they should be specifically stated; as well as any leases of any portions of such real estate, with the terms of the same. If the decedent held the real estate in common with others, that fact should be set forth in the petition; and in all cases, the nature and extent of his interest or the title in and to the real estate prescribed in the petition should be explicitly mentioned.

In case the decedent left a widow entitled to dower; or in case the dower of such widow in all the real estate of the decedent should previously have been assigned to her in other premises of the decedent; or if provision should be made for her by will, in lieu of dower; or if, by an antenuptial contract, she be barred from claiming dower, the facts respectively should be stated. And in case dower should already have been assigned to the widow in the premises described in the petition, under proceedings previously instituted by her, a description of that portion of the premises covered by the dower should be given in the petition.

In case the decedent held the entire premises described in the petition by a fee simple title, the prayer of the petition should be for the sale of the same, or so much thereof as may be deemed necessary to pay the claims against the estate; and if there be a widow entitled to dower, that such dower may be assigned her in the premises. Should the interest of the decedent, in the real estate described be in common with other persons, the petition should ask for a sale of such undivided interest—leaving a division of the premises for the joint action of the purchaser at the sale and those holding in common with the decedent.

(1) The mortgage lien remains in full force, if the mortgagee is not made a party to the suit. *Holloway v. Stuart's Adm'r*, 19 Ohio St. 472.

In case there should be rival lienholders, the petition should ask the court to adjust the question of priority between them, and to direct how the purchase money must be applied.

The petition being prepared, the executor or administrator must go before some officer authorized to administer oaths, and make oath or affirmation, in substance that the various matters and things in it contained are true, to the best of his knowledge and belief. A certificate of this oath (66) must be appended to the petition by the officer who administers the oath.^a

The law now provides that in proceedings relating to the sale of real estate to pay debts, whether in the probate court or court of common pleas, service, either actual or constructive, must be made in the same manner as in other civil actions, and that all the proceedings in the action must be the same as in other civil actions, *except* as otherwise provided below.^b

A civil action for such sale (as are others also) is brought, and summons is served, as follows: The plaintiff must file, in the office of the clerk of the proper court, a petition (66).^c He must then cause a summons to be issued thereon, by filing with said clerk a precipe (68), stating therein the names of the parties to the action, and demanding that a summons issue.^d

ACTUAL SERVICE.—In such actions for such sales, the summons, which, in every case is *issued* by the clerk, may be *served*: 1st. *By the sheriff*, as in other cases. When so served, the plaintiff has nothing to do with it, except to give the directions mentioned, on page 140. 2d. *By the plaintiff, etc.* The law now specially provides that, in actions for such sales, unless otherwise ordered by the court, the summons may be served by the plaintiff or other person by copy personally, and that the return of such service must be verified by the oath of the person who makes the same (167).^b

If no such service is made upon any defendant, and he do not waive service as mentioned below, the judgment of the court will not be binding upon him.

(a) §§ 5102, 5105, 5107.

(c) § 5035.

(b) § 6143.

(d) § 5036.

A summons may be issued to any other county, against one or more of the defendants, at the plaintiff's request.^a

When the time for bringing parties into court is not fixed by statute, the summons shall be returnable on the second Monday after its date; but when it is issued to any other county, it may be made returnable, at the option of the party having it issued on the third or fourth Monday after its date. The day of the month on which it is returnable shall be stated therein.^b

When a writ is returned "not summoned," other writs may be issued, until the defendant is summoned; and when defendants reside in different counties, writs may be issued to such counties at the same time.^c

When the defendant is under fourteen years of age, service must be made upon him and also upon his guardian or father, or if neither of these can be found, then upon his mother, or the person having the care of such infant, or with whom he lives; and if neither of these can be found, or if the defendant is a minor over fourteen years of age, service upon the defendant alone shall be sufficient. The manner of service may be the same as in the case of adults.^d For this reason the ages of minors must be stated in the manner directed in the petition (66) (115).

CONSTRUCTIVE SERVICE.—Service by publication (71) (116) may be made on any defendant who resides out of the state; or whose residence is unknown; or who, though a resident, has departed from the county for the purpose of avoiding service; or who keeps himself concealed for the same purpose; or which is a foreign corporation, having no agent in this state on whom service can be made. In any such case, when the residence of a defendant is known, it must be stated in the publication; and, immediately after the first publication, the party making the service shall deliver to the clerk copies of the publication, with the proper postage, and the clerk shall mail a copy to each defendant, directed to his residence named therein, and make an entry thereof on the appearance docket. In all other cases, the party making the service, his agent or attorney, shall, before the hearing, make and file an affidavit (70) that the residence of

(a) § 5038.

(b) § 5039.

(c) § 5040.

(d) § 5047.

the defendant is unknown, and can not, with reasonable diligence, be ascertained.^a

Before service by publication can be made, an affidavit (70) must be filed that service of a summons can not be made within this state, on the defendant to be served by publication, and that the case is one of those mentioned in the 14th Section of Chapter 6, Division 2, Title 1, Ohio Laws, and relating to procedure in the court of common pleas and other courts. When such affidavit is filed, the party may proceed to make service by publication (71).^b

The publication (71) must be made six consecutive weeks, in a newspaper printed in the county where the petition is filed; or, if there be no newspaper printed in the county, then in a newspaper printed in this state, and of general circulation in such county; and if it is made in a daily newspaper, one insertion a week shall be sufficient. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer.^c

Service by publication shall be deemed complete at the date of the last publication, when made in the manner and for the time prescribed in the preceding sections; and such service shall be proved by affidavit.(71)(116)^d

The answer or demurrer of the defendant must be filed in court on or before the third Saturday after the publication is complete.^e

In all cases where service may be made by publication, per-

(1) Where a record of a proceeding in the court of common pleas, to subject lands of a decedent to the payment of debts, upon the petition of the administrator, under the statute of 1831, sets out that it was "shown to the court that *due notice* had been given to the defendants: *Held*, that this language imports a finding by the court that the notice which the law required under the circumstances had been regularly given. Evidence will not be received to contradict this finding of the court. Where jurisdiction is shown, or must be presumed, the judgment or order of the court can not be collaterally impeached. *Richards v. Skiff et al.*, 8 Ohio St. 586.

(a) § 504, as corrected, 77 O. L. 42.

(d) § 5051.

(b) § 5049

(e) § 5097.

(c) § 5050.

sonal service of a copy of the summons and petition may be made out of the state.^a

When an heir or a devisee of a deceased person is a necessary party, and it appears by affidavit (70) that his name and residence are unknown to the plaintiff, proceedings against him may be had without naming him; and the court or a judge thereof must make an order respecting the publication of notice, but the order must require not less than six weeks' publication.^b

WHEN SERVICE UNNECESSARY.—An acknowledgment on the back of the summons or petition, by the party sued, or the voluntary appearance¹ of a defendant (67), is equivalent to service.^c

(1) Filing an answer, demurrer, motion, or notice of appeal in the case, by a defendant who is of age, and who is of sound mind and under no restraint, are among the ways in which such voluntary appearance can be made, either in person or by authorized attorney. *Abernathy v. Lattimore, J. & Co.*, 19 Ohio, 286; *Bryans v. Taylor*, W. 245; *Schaefer & S. v. Waldo, B. & Co.*, 7 Ohio St. 309; *Klorine v. Bradstreet*, 2 H. 74; *Evans v. Hles*, 7 Ohio St. 233; *Fee v. Big Sand-iron Co.*, 13 Ohio St. 563; *Buckingham v. McCracken*, 2 Ohio St. 287; *Harrington v. Heath*, 15 Ohio, 483, 487; *Maholm v. Marshal*, 29 Ohio St. 611; *Watson v. Payne*, 25 Ohio St. 340; *O'Neal v. Blessing*, 34 Ohio St. 33.

If a person, not a party to the writ, files an answer by leave of court, he thereby becomes a party to the action, and will be bound by the judgment in the case. *Rosenthal v. Sutton*, 31 Ohio St. 406; *Brundage v. Biggs*, 25 Ohio St. 652; *Watson v. Paine*, 25 Ohio St. 340.

In proceedings to sell decedent's real estate by execution to pay debts, persons in interest not named in the petition are properly parties on the record, although the statute requires the executor to proceed by petition, to which the heirs, etc., shall be made defendants. *Ewing v. Hollister*, 7 Ohio (2 pt.), 138.

Appearing in court and assenting to setting the case for oral argument, and partially arguing it, is a general appearance and submission to the jurisdiction to the court. *C. C. & C. R. R. v. Mara*, 26 Ohio St. 185. Somewhat similar, *Hammond v. Mara*, 21 Ohio St. 620.

As to one partner waiving service for another partner, see *Whitman v. Keith*, 18 Ohio St. 134, 147.

But a motion denying jurisdiction, on the ground of insufficiency of process, is not an appearance. *Whitehead v. Post* (Logan Com. Pleas), 3 W. L. M. 195.

(a) § 5052.

(c) § 5043.

(b) § 5053, *asam.* 79, O. L. 26

If all persons¹ in interest consent (67) in writing to the sale, service of process may be dispensed with; and legal guardians may sign such consent for their wards, except guardians of the persons only of minors.^a

It shall not be necessary, unless the prayer of the petition for a sale is contested, to appoint guardians *ad litem*² for infant heirs or devisees or other persons having the next estate of inheritance from the deceased who are defendants; and no such guardian² shall have authority to waive notice or service of summons.^b

The defense of (152) an infant must be by a guardian for the suit,³ who may be appointed (75) by the court in which the action is prosecuted, or by a judge thereof, or by a probate judge.^c

The appointment may be made upon the application (151) of the infant, if, being of the age of fourteen years, he apply within twenty days after the return of the summons, or service by publication; and in case of his being under said age, or of his neglect so to apply, the appointment may be made on the application (151) of the plaintiff, or a friend of the infant; but the appointment (75) can not be made until after service of summons or publication.^d The guardian of an infant must deny, in the

(1) The power of a married woman to waive service of process upon her by signing a paper, with her husband waiving it, is questioned, but not decided. *Hubbell v. Broadwell*, W. 248.

(2) For various matters relating to minor heirs and the powers of guardians *ad litem* in such cases, under the act of 1824 and other acts, see *Ewing's Lessee v. Higby*, 7 Ohio (pt. 1), 198; *Ewing v. Hollister*, 7 Ohio (2 pt.), 138; *Robb v. Irwin's Lessee*, 15 Ohio, 689; *Snively et ux. v. Lowe*, 18 Ohio, 368; *Sheldon's Lessee v. Newton*, 3 Ohio St. 494; *Benson et al. v. Cilley et al.*, 8 Ohio St. 604; *Biggs v. Bickel*, 12 Ohio St. 49; *Wood v. Butler*, 23 Ohio St. 520; *Piatt v. Longworth's Devisees*, 27 Ohio St. 159; *Lucht, Adm'r, v. Behrens*, 28 Ohio St. 231.

(3) In a proceeding by an administrator for the sale of lands to pay debts, the answer of a guardian *ad litem* for minor heirs, alleging his ignorance of the matters contained in the petition, and praying that the rights of his wards may be protected, has the effect of a general denial, and requires proof of all the material averments in the administrator's petition. *Wood v. Butler*, 23 Ohio St. 520.

(a) § 6143.

(b) § 6144.

(c) § 5003.

(d) § 5004.

answer (152), all material allegations of the petition prejudicial to such defendant.^a

It is perhaps the better and safer practice to appoint a guardian for the suit (*ad litem*) in all cases where there are minor defendants, and to have regular service of summons on them, either actual or constructive.

But when a part or all of the defendants are of age, are willing and competent to consent in writing, as above provided, and it is desired to avoid the expense of service on such defendants (and this expense is sometimes considerable, especially in case of non-residents), then such defendants may give such consent (67); and if it be done before filing the petition, no service upon them should be asked for in the precipe; and if all the defendants can and do thus consent, no precipe should be filed. The petition, consent in writing, and precipe may each be on a separate piece of paper; but the better practice is to attach the consent and the precipe to the petition, and to mention and describe the parties, as suggested in the note appended to Form 68.

Plain directions (69) in writing as to where defendants may be found, etc., should be left with the clerk or sheriff, on a separate piece of paper, or in a book kept for that purpose, as may be the custom in the county where the action is brought. Otherwise, the summons would probably be returned indorsed "defendants not found."

The executor or administrator who has occasion to sell real estate as directed in this chapter, and who has read the directions thus far given, will no doubt have concluded, and correctly, that at least in none but the simplest cases should he attempt to proceed without the advice and assistance of some competent attorney.

After the petition has been filed, any of the persons interested in the estate may enter into a bond (72) to the executor or administrator, with sureties to be approved by the court, conditioned for the payment of all the debts mentioned in the petition that may eventually be found to be valid claims against the estate, with the charges of administering the estate, and the allowance in money to the widow, or the widow and children, in case the personal estate of the decedent should be insufficient

(a) § 5078.

for those purposes ; and in that event the court has no authority to grant an order of sale.^{1 a}

But if no such bond be given, and if the court be satisfied that it is necessary to sell real estate of the deceased to pay his debts it must order² the real estate, or so much thereof as may be necessary for the payment of the debts, to be sold by the executor or administrator, upon deferred payments, not exceeding two years, with interest.^b

The court may include in its order of sale, the title of the heirs or devisees of the deceased, in the premises set off to the widow for her dower, which may be sold subject to the life estate of the widow therein.^c

If the deceased did not leave a widow, entitled to dower in the estate to be sold, and an appraisement of such real estate is contained in the inventory, the court may order a sale according to said appraisement, or order a new appraisement. If the court do not order a new appraisement, the appraisement set forth in the inventory shall be deemed the appraised value of the real estate ; but if the court order a new appraisement, the value returned by such appraisers shall be deemed the appraised value of the real estate. The order of

(1) Where an order of court was obtained by an execution for the sale of lands to pay the debts of the estate, and after the granting of the order, and in consideration that the executor would forbear to carry it into execution, a bond was executed on behalf of the heirs, conditioned that the obligors would pay the debts of the estate: *Held*, that the bond, although not in strict conformity to the statute, which provides that if such a bond be executed *before* the order of sale, no order shall be granted, is nevertheless binding upon the obligors, and may be enforced against them by the executor. *Davison v. Burgess*, 31 Ohio St. 78.

(2) This order may be appealed from. An administrator can only sell his intestate's real estate to pay debts, upon the express order of the court, after the necessity of such sale has been ascertained. *Lessee of Avery v. Pugh*, 9 Ohio, 67. See also *Lessee of Newcomb v. Smith*, 5 Ohio, 447, and *Lessee of Ludlow's Heirs v. Park*, 4 Ohio, 5. A sale made by an administrator before authorized by court is void. *Lessee of Ludlow's Heirs v. Park*, 5 Ohio, 5.

(a) § 6146.

(b) § 6147.

(c) § 6148.

sale, and the order for the appraisement, may be made at the same time, if no assignment of dower is required.^a

If there be a widow entitled to dower, an order for the assignment of dower and appraisement of the premises subject to such dower, must precede the order of sale.

The widow may, in her answer (153), waive the assignment of dower by metes and bounds or in the rents and profits, and, consenting to have the premises sold free of dower, ask the court to allow her, in lieu thereof, such sum of money¹ out of the proceeds as the court may deem the reasonable value of her dower interest therein; and, in such case, upon the sale of the lands free of dower, and the awarding to her such sum, her answer will have the same force and effect as a deed of release of her dower to the purchaser of the lands.^b

If the widow shall have been adjudged insane or imbecile, her guardian may, with the consent (154) and approval of the judge of the court in which the action is pending, file such answer (153) in her behalf, and it will have the same force and effect as if she were not under disability, and filed the same personally.^c

Except in cases where there has been a valuation of the real estate in the inventory, and the court dispense with another appraisement, the court will, upon finding that a sale is necessary, appoint three judicious, disinterested men of the vicinity, who are freeholders (73), to appraise the lands at their true value in money; and, if the deceased left a widow entitled to dower in the premises (unless she, in her answer filed, shall have waived dower, as above mentioned), the court will also order (73) that said freeholders set off and assign to her, in each or in one or more of the tracts of land, by metes and bounds, one equal third part of the whole lands in which she is entitled to dower, as and for such dower, and to appraise (73)(74) the whole premises, either as a whole or in parcels, subject to such dower so assigned; but if, on view, the appraisers find that the dower can not be so

(1) See note 1, p. 133. See also 79 O. L. 37.

(a) § 6154.

(c) § 5721.

(b) §§ 5719, 5720

assigned, they must then assign such dower specially as of the rents and profits; and if the lands lie in two or more counties, the court may, if it think fit, appoint appraisers in more than one of the counties. In all cases, a copy of the order to be executed must be issued to the executor or administrator.^a

The names of the appraisers are usually suggested to the court by the executor or administrator, or by his attorney; and where no objection is made, it is customary for courts to appoint the persons suggested.

When any person appointed by the court as an appraiser fails to discharge his duties, the probate judge or any justice of the peace of the county in which the lands to be appraised are situate, may, at the instance of the executor or administrator, appoint an appraiser, of which appointment the officer appointing must make and sign a certificate (14) which must be returned with the appraisement; or the executor or administrator may apply to the court making the order of appraisement and have another appraiser appointed thereby.^b

Should the petition be filed in and the order of appraisement be made by the probate court, the better practice is to have the vacancy filled by the probate judge, that the entire proceedings may appear upon the record to have been authorized and directed by him.

Before proceeding to discharge their duties under the order of court, the appraisers must appear before a justice of the peace, mayor of a city or incorporated village, notary public, probate judge, deputy clerk of the probate court, or judge of the court of common pleas, and make oath faithfully and impartially to perform the duties incumbent upon them as such appraisers; a certificate of which oath must be inserted in or attached to their return (77). They shall afterward actually view or make examination of the entire premises to which the order of the court relates; and having done so, they shall then perform the other duties required of them by the order of the court, and make return of their proceedings in writing to the court (78).^c

(a) § 6155.

(b) § 6156.

(c) § 6157.

When necessary, the appraisers may call to their assistance the services of a competent engineer. This power is incidental to the duties imposed upon them.

It is entirely discretionary with the appraisers to say what portion of the premises shall be covered by the dower. In assigning specially, as of rents and profits, they should first estimate the net yearly value, after deducting taxes, probable repairs, and other necessary expenses,* of all the real estate in which the dower is to be assigned, and award to the widow a third part of such net value, to be paid her annually, during life; and in case there be more than one tract or lot in which dower is thus specially assigned, the appraisers should specify the amount awarded upon each.

If the deceased left a widow, or a minor child or children unmarried and composing a part of his family at the time of his death, and in case the real estate mentioned in the petition of the executor or administrator be the homestead of the family, it is the duty of the appraisers to set apart by metes and bounds, if possible, a homestead¹ (78), not exceeding one thousand dollars² in value, in addition to the dower estate of the widow. Such homestead will remain exempt from sale on execution, and exempt from sale under any order of the court, so long as the widow, if she remain unmarried, or any unmarried child resides thereon,³ although the widow should die. And should both the parents of such minor child or children be dead at the time of making the appraisement, and should such child or children be residing on the family homestead, he, she, or they will be entitled to the benefit of the act relating to homesteads; and

(1) A homestead must be set off in the lands of the decedent's estate only when there is a widow, and a minor child (or children) unmarried, who composed a part of the decedent's family at the time of his death, and this right of homestead will terminate as soon as such child (or children) shall be either dead, married, or of age.

The other provisions of law granting a homestead to a widow without minor child or children composing a part of her family, and exempting from execution other real or personal property in lieu of homestead, when she has no homestead, refer to property owned by her in her own right. *Taylor v. Thorn*, Adm'r, 29 Ohio St. 569.

(2) See note 2, next page.

(3) If the debtor has voluntarily abandoned his homestead before claiming it, his right is gone. *Jackson v. Reid*, 32 Ohio St. 443.

*See 25 O. S. 557.

a sale of such homestead can not be made so long as an unmarried minor child of the decedent resides thereon.^a

But this exemption does not apply when the execution issues upon a judgment or decree rendered on a mortgage executed in the lifetime of the decedent in conjunction with his wife, or for any claim for work or labor less than one hundred dollars; nor shall such exemption impair any lien, by mortgage or otherwise, for the purchase money of such homestead; nor the lien of a mechanic or other person, under the law authorizing mechanics' liens, nor the lien for taxes due upon such homestead.^b

The widow may remain in the mansion-house of her husband, free of charge, for one year after his death, if her dower be not sooner assigned to her.^{1c}

Having assigned dower and a homestead,² the next duty of the appraisers is to estimate the value of the real estate subject to such dower interest and homestead. Should there be several tracts of land or town lots, and should dower be assigned in one for all, those tracts or lots which are unincumbered by dower should be appraised accordingly, and the one in which dower has been assigned should be appraised subject to the same.

In arriving at the value of a tract of land subject to dower, the proper method is to estimate the value of the entire tract without reference to dower, then to appraise the probable value of the dower interest, taking the age and health of the widow into consideration, and deduct it from the gross value of the entire tract; the remainder will be the value of the tract subject to dower estate. Or, to make the subject plainer, the appraisers should determine the question: How much is the entire tract worth, subject to the right of the widow to use and occupy during life that portion of the same which we have assigned to her for dower? And the value of a tract subject to a homestead may be arrived at by a similar process.

(1) See last two paragraphs of note 1, p. 38.

(2) When, as against some of the liens, a homestead can not be claimed, and against others it may be, the law provides that in case of a sale of the premises, the liens which preclude a homestead shall be first paid out of the purchase money, and the residue, not exceeding five hundred dollars, shall be paid (if claimed) in lieu of a homestead.¹

For the law relating to homesteads and exemptions from execution, which need not all be given here, see §§ 5426-5446; as to dower, see §§ 4188-4194.

(a) §§ 5437, 5438; 79 O. L. 107.

(c) § 4188.

(b) § 5434.

(d) § 5440.

It should be borne in mind by the appraisers that they are not only to appraise the residue of the tract left after setting off the widow's dower, but the entire tract, including the portion assigned for dower, subject to such dower interest.

The appraisers should make return of the value of lands in gross, and not at a certain price per acre.

If there be no dower or homestead to set off, the duty of the appraisers will be plain; and no more will be required of them than to estimate the value in money of the tract or several tracts mentioned in the petition.

No definite rule for the making of appraisements of equitable interests in real estate can be laid down, as each case possesses characteristics of its own, and is subject to conditions peculiar to itself; the only guide for the appraisers in such a case is the order of the court.

After having discharged the several duties enjoined on them by law, it remains for the appraisers to make report to the court of their action in the premises. Such report must be in writing, and signed by them; and should consist of a detailed statement of their proceedings, describing fully and definitely the dower assigned to the widow; the homestead set off to the widow and children, or either; and specifying the value they have placed upon the several tracts, and whether such valuation is subject to the dower interest of the widow, or a homestead for the family (78).

The appraisers are entitled to one dollar per day for services performed by them in the county in which they reside, and two dollars per day for services in any other county.^a

When dower has been assigned in connection with the appraisalment, the report of the appraisers must be submitted to the court for confirmation, before an order of sale can be made; but, as before remarked, should no assignment of dower be required, an order of appraisalment and sale may be made at the same time by the court; and in that case the report of the appraisers need not be presented for confirmation until after the sale, and until the report of sale is also ready to be submitted.

If the assignment of dower and appraisalment appears to have

(a) § 1300.

been regularly and correctly made, the court will approve (79) the report of the appraisers, and order a sale (79) of the premises, or so much thereof as may be necessary to pay the debts of the decedent, subject to such dower estate, or to such dower and a homestead, as the case may be.

When dower is assigned specially, as of rents and profits, the court is required to secure the payment of the same to the widow, by making the amount allowed a charge upon the real estate in which the dower has been assigned.^a

Should it appear from the petition of the executor or administrator that a sale of a portion only of the real estate of the decedent will be required for the payment of his debts, but that by a partial sale an injury will result to the residue of his real estate, or any portion thereof, the court may, if deemed for the interest of all concerned in such property, order a sale of the entire estate.^b

Before making sale of all the real estate of a decedent, when only a portion is necessary for the payment of debts, the executor or administrator must give bond (80) to the State of Ohio, in such sum as the court may direct, with sureties to be approved by the court (147), conditioned to account for all the proceeds of the sale that may remain after the payment of the debts and charges for which the land is sold, and to dispose of the same according to law.^c

The court may also require of any executor or administrator, if it shall deem it necessary, before such sale, to give an additional administration bond (80), to secure the further assets arising from the sale of the real estate, and the bond¹ mentioned in this paragraph, and the bond mentioned in the next preceding paragraph, must, when so ordered to be given, be given

(1) Does a bond, the condition of which recites the appointment as administrator of the personal estate of the decedent, and proceeds, "now if the said G. G. shall well and truly do and perform all and every of the duties required of him as administrator as aforesaid, according to law," etc., cover a surplus of money left in the hands of the administrator, arising from the sale of land to pay debts of the intestate, *quære*. *Griswold v. Frink*, 22 Ohio St. 79, 90.

(a) § 6164.

(c) § 6150.

(b) § 6149.

in the court from which the letters were issued, and if the action is pending in another court, the latter court shall proceed no further till there is filed therein a certificate from the former court, under the seal thereof, that such bond has been given as ordered.^a

The power of the court to adjust all liens on the land has been already spoken of on a preceding page.¹

Should any person object, in his answer, to the granting of an order of sale, the court may award the costs of the trial resulting therefrom against such person, in case the objection should be found to be unreasonable; or against the executor or administrator, if the petition should be unwarranted or unnecessary; or may make such other order with respect to the costs as circumstances may warrant.^{2 b}

The sale must be made at public vendue, at the door of the court-house in the county in which the order of sale shall have been made, or at such other place as the court may direct. But if it is made to appear to the court that it will be more for the interest of said estate to sell such real estate at private sale, the court may authorize the petitioner to sell the same, either in whole or in part,³ for cash in hand, or upon deferred payments, not exceeding two years, with interest; and in no case can such real estate be sold at private sale for less than the appraised value thereof.^c

A sale upon the premises will in most cases be most advantageous to the estate.

Before making sale, an executor or administrator must give notice of the time and place of sale, by advertisement for at

(1) See pp. 132, 133.

(2) In a proceeding by an administrator to sell real estate to pay judgments entered on awards of arbitration, it is competent for the heir, in a cross-petition in the same proceeding, to attack said judgments for fraud. *Conway v. Duncan*, 28 Ohio St. 102.

(3) An executor or administrator may sell in parcels a tract of land which has been appraised entire, but is responsible for the abuse of his discretion in this respect. *Lessee of Ewing v. Higby*, 7 Ohio (pt. 1), 198; *Lessee of Stall v. Macalester et al.*, 9 Ohio, 19.

(a) § 6151.

(b) § 6153.

(c) § 6161.

least four successive weeks in some newspaper printed in the county in which the lands are situate (81); or, if no newspaper be printed therein, by advertisements posted up in at least five public places in the county, four weeks previous to the day of sale (81).^{1a}

The terms of sale, if not definitely prescribed by the court, are optional with the executor or administrator, provided he keep within the two years beyond which he is not authorized by law to extend the time of payment.^a The terms usually adopted are: one-third of the purchase money to be paid in hand, and the residue in two equal payments of one and two years from the day of sale, with interest. When the necessities of an estate require that the payments be made in other proportions, and upon shorter time, the executor or administrator should, in order to avoid cavil, ask the court to prescribe the terms of sale.

Lands, if improved, can not be sold for less than two-thirds, and if not improved, for less than one-half, of their appraised value; but if, after being twice offered, the property is not sold (82), the court may set aside the appraisement, and order a new one to be made (83), or may fix a price at which the property may be sold if a bidder can be obtained at that sum (84).^b

It may be well, in order to prevent mistakes, to notify purchasers, on the day of sale, that the growing crops, if any, are reserved; although such crops do not pass with the land, if not reserved.²

The property must be offered for sale at the time and place mentioned in the notice; and if the notice mention an hour at which the sale will commence, the executor or administrator, or the auctioneer employed by him, must be present at that hour

(1) Where the statute requires a notice of the time and place of sale to be given for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, it seems its words will be answered by one publication in a newspaper thirty days before the day of sale, and will not require an insertion in each paper that may be issued between the date of the first insertion and the sale. *Craig's Adm'r v. Fox et al.*, 16 Ohio, 543. See also *Lessee of Stall v. Macalester et al.*, 9 Ohio, 19.

(2) *Cassilly v. Rhodes*, 12 Ohio, 88; *Houts v. Showalter*, 10 Ohio St. 124.

(a) § 6159.

(b) § 6160.

and open the sale; but if the notice state that the sale will take place between certain hours named, it may be opened at any time before the expiration of the time mentioned.

Should no person bid at least two-thirds of the appraised value of the land, if improved, or one-half, if not improved, the property must remain unsold, and the executor or administrator will be compelled to re-advertise and offer the same. In case no sale be effected after offering the premises twice, the executor or administrator should make return of the fact to the court (82), and obtain an order of re-appraisement (83). And in case no sale should be effected after repeated attempts at so doing the executor or administrator should represent to the court the necessity of fixing a price at which the property may be sold (84).^a Should a sale not take place at the first time the premises are offered, the executor or administrator need not make report to the court of his failure to sell; but, after offering the same the second time, he may make report of the result, as well as of the result of the first trial (82).

An executor or administrator can not directly or indirectly purchase any real estate by him offered for sale as the legal representative of a deceased person;¹ nor can an appraiser of such property be a purchaser, in case such sale be made under a valuation which he assisted in making.^{2b}

The executor or administrator must make report in writing, to the court, of his proceedings under the order of sale (85).^a The report should show that he in all respects complied with the requirements of the law and the order of the court, in giving notice, in offering the premises at the time and place mentioned in the notice, and in the time allowed for the payment of the pur-

(1) *Mitchell v. Dunlap*, 10 Ohio, 117; *Glass et al. v. Greathouse et al.*, 20 Ohio, 503; *Sheldon's Lessee v. Newton*, 3 Ohio St. 494; *Barrington's Adm'r et al. v. Alexander et al.*, 6 Ohio St. 189; *Welsh v. Perkins*, 8 Ohio 52, 55; *Riddle v. Roll*, 24 Ohio St. 572; *Piatt v. Longworth's Devisees*, 27 Ohio St. 159; *Beard v. Westerman*, 32 Ohio St. p. 29. As to trustees' sale, *Ramelsberg v. Mitchell et al.*, 29 Ohio St. 22; notes 39-42, pp. 342-343.

But such sale will be good, if executed with the subsequent ratification of the heirs. *Mitchell v. Dunlap*, 10 Ohio, 117. See also p. 84, last paragraph.

(2) *Armstrong v. Huston's Heirs*, 8 Ohio, 551; *Bohart v. Atkinson*, 14 Ohio, 228; *Terrill v. Auchauer*, 14 Ohio St. 80.

chase money. It is not sufficient that the report state generally that notice was given and the sale made according to law; but must set forth particularly *how*, and *for what length of time* the notice was given; and *when* and *where* the property was offered, together with the terms of sale, and whether the same were complied with by the purchaser. It is the province of the court, and not of the executor or administrator, to say whether his proceedings were according to law.

Before the court can confirm a sale by an executor or administrator, made under an order allowing such officer to make private sale, the court must require such officer to make and file an affidavit (155) that such private sale has been made after diligent endeavor to obtain the best price for the property, and that the sale reported is for the highest price he could get for the property.^a

Should the court, on examining this affidavit and the return, find that the sale was in all respects legally made, the same will be confirmed (86), and the court will order the executor or administrator to make a deed or deeds to the purchaser or purchasers¹ (86); and the court may also in the order require that before the delivery of such deed the deferred installments of the purchase money shall be secured by mortgage.^b

The notes taken for the purchase money must be dated on the day of sale, must bear interest from date, and, as a matter of safety, should, whether so ordered by the court or not, be secured by mortgage on the premises sold.

The deed of an executor or administrator is a conveyance in fee simple, without covenants of warranty (87); and a purchaser has no recourse against the executor or administrator, nor against the estate, if the title to the premises sold should prove to be defective.² But in case the title of the purchaser should be

(1) An administrator may, with the consent and by the direction of the purchaser at the sale, convey the premises sold to a person other than the purchaser. *Ewing's Lessee v. Higby*, 7 Ohio (pt. 1), 198.

(2) But the purchaser, where the sale is regular and the title perfect, holds such estate discharged of liens, the holder of the lien being bound to look to the executor or administrator and his bond for the faithful applica-

(a) § 6412.

(b) § 6162.

invalid by reason of a defect in the proceedings, he may be subrogated to the rights of the creditors of the estate to the extent of the money paid to the executor or administrator; and to the same extent will have a lien on the property sold as against all persons except *bona fide* purchasers without notice.

A deed made by an executor or administrator in pursuance of an order of court, is taken in all courts of this state as *prima facie* evidence that the executor or administrator in all respects complied with the requirements of the law in making the sale, and vests the title in the purchaser in like manner as if the estate had been conveyed by the decedent in his lifetime.^{1a}

When an executor or administrator dies, resigns, or is removed, or when his letters are revoked, a sale of real estate by him previously made in accordance with the statute, will remain valid and effectual.²

tion of the purchase money. *Bank of Muskingum v. Carpenter's Adm'rs et al*, 7 Ohio (pt. 1), 21; *Stiver's Adm'r v. Stiver's Heirs et al.*, 8 Ohio, 217.

An administrator, in selling lands of his decedent, which he conveys without covenants of warranty, can not render the estate of the deceased liable in damages, by false representations as to the condition of the title, or the extent of existing incumbrances. *Dunlap v. William's Adm'r*, 12 Ohio St. 530.

An administrator's sale may be voidable in the hands of the first purchaser, and yet valid in the hands of a second purchaser in good faith for a valuable consideration, and without notice. *Piatt v. St. Clair's Heirs et al.*, 7 Ohio (pt. 2), 165.

Where an administrator's deed has no words of perpetuity, a court of equity will correct it. *Piatt v. St. Clair's Heirs et al.*, 7 Ohio (pt. 2), 165.

(1) The title of a purchaser to real estate sold by an administrator to pay debts is not divested by a subsequent reversal of the order of sale. Nor does the fact that the purchaser on the day of sale had notice that an effort would be made to reverse the order, affect his title. *Irwin v. Jeffers et al.*, 3 Ohio St. 389. See also *Lessee of Ewing v. Higby*, 7 Ohio (pt. 1), 198; *Ewing et al. v. Hollister's Adm'r*, 7 Ohio (pt. 2), 138; *St. Clair v. Morris*, 9 Ohio, 18; *Lessee of Ludlow's Heirs v. Wade*, 5 Ohio, 494; and *Lessee of Stall v. Macalester et al.*, 9 Ohio, 19.

(2) An unmarried administratrix obtained, on her petition, a decree for the sale of land of the intestate, and it was offered for sale on an order of sale, and also on an *alias* order, but not sold for want of bidders. She then

Where a legacy has been given by a written will, and the personal estate of the decedent, after payment of his debts and the preferred claims against his estate, is insufficient to pay such legacy, the executor or the administrator with the will annexed may sell real estate of the decedent for that purpose, after obtaining an order of court, in the same manner and upon the same terms and conditions as for the payment of other claims.^a

The heirs of a decedent can not, by making sale of his real estate, prevent a sale of the same by the executor or administrator, when necessary for the payment of debts;^b and a person purchasing real estate from heirs does so at his own peril, even though he should have no knowledge of the existence of debts against the estate of the decedent.¹

If at any time after the institution of proceedings for the partition of the lands of any deceased person, it is found that the assets in the hands of the executor or administrator of such deceased are probably insufficient to pay the indebtedness of the estate and expenses of administration, the executor or administrator must make a written statement (156) to the probate court of the said assets and indebtedness and expenses, and the court must forthwith ascertain the amount necessary to pay the said indebtedness and expenses in addition to the assets, and give a certificate (157) thereof to the executor or administrator.^b

The executor or administrator must thereupon present said certificate to the court in which the proceedings for partition are, or have been, pending, and on his motion (88) said court shall order the amount named in said certificate as necessary, to be

married. Afterward a *pluries* order issued under the same decree, and the land was sold, and the sale was sustained on the ground that an order of sale *once begun* was not abated by the marriage of the administratrix. *Craig v. Fox et al.*, 16 Ohio, 563. See notes 75-80, pp. 348-349.

(1) The sale of lands by an heir is good to convey the title, but the purchaser takes the land charged with the debts of the ancestor. *Piatt v. St. Clair's Heirs et al.*, 6 Ohio, 227. Creditors must first exhaust their remedy against the personal representative, before they can have recourse to lands in the hands of purchasers from the heirs. *Stiver's Adm'r v. Stiver et al.*, 8 Ohio, 217. See two preceding pages, and note 1, p. 5, and note 8, p. 131.

(a) § 6172.

(c) § 6173.

(b) §§ 5972-5975.

paid over to the executor or administrator out of the proceeds of the sale of the premises, if they shall be thereafter sold, or have already been sold: but nothing in this nor in the preceding paragraph is to be so construed as to prohibit any executor or administrator from proceeding to sell lands belonging to such estate to pay debts, when the same has been sold on partition or otherwise, or the proceeds of such sale fully distributed.³

The surplus proceeds of a sale of lands for the payment of debts remaining in the hands of an executor or administrator after final settlement, will be treated as real estate, and distributed accordingly.¹ But lands directed by will to be sold and converted into money are considered in equity as personal property.²

An executor or administrator has no right to mortgage, lease, or rent the real estate of a decedent, unless authorized by will.

(1) The surplus proceeds of a sale of real estate by an administrator, remaining in his hands on the final settlement of his account, under the statute, are to be considered and disposed of as *real estate*, and the widow of the intestate is not entitled to any part thereof in her capacity as one of the distributees of the *personal* estate of the deceased. *Griswold v. Frink*, 22 Ohio St. 79.

(2) *Ferguson et ux. v. Stuart's Ex'rs*, 14 Ohio, 140; *Brewster et al. v. Benedict et al.*, 14 Ohio, 368; *Collier v. Collier's Ex'rs*, 3 Ohio St. 369. A. died leaving lands, which descended to B., a posthumous child, leaving C., his widow, and mother of the child, and surviving brothers and sisters. On petition of the administrator of A., the lands were sold by order of the probate court, for the payment of debts, and from the proceeds the widow was paid the value of her dower interest; after which, and before distribution of the surplus, B. died intestate, without lineal heir. *Held*, that as to the estate of A. the proceeds of the sale are to be regarded as *real estate*; but as to the estate of B. as *personal* estate; and that the surplus money so belonging to B., after the payment of the widow's dower and the debts of A., upon the death of B., was subject to the law of distribution as the *personal* estate of B., and that, as between the brothers and sisters of A. and C., the same belonged to C., the mother and legal representative of B. *Pence et al. v. Pence's Adm'r et al.*, 11 Ohio St. 290. See also note 1, p. 106.

(a) § 6174.

Nor can he assign a certificate of the entry or location of land, unless specially authorized by will.¹

The executor or administrator is the proper party to compel a creditor, who holds lands in trust to satisfy his debt, to execute the trust, or to set aside a sale of lands by such trustee, if fraudulently made.²

The levy of an attachment in an action against a devisee, will not defeat or prevent the execution of a power of sale given by the testator to his executor, nor will such levy affect the title of the purchaser at the executor's sale.³

As to the powers and duties of foreign executors and administrators with respect to the sale of lands, see Chapter XIII., Section I.

(1) *Reeder et al. v. Barr et al.*, 4 Ohio, 446; *Bonner v. Ware et al.*, 10 Ohio, 465; *Bell et ux. v. Duncan et al.*, 11 Ohio, 192.

The general rule in such cases is subject to the qualification that where, by act of Congress, an executor or administrator is authorized to assign a certificate of location in a certain class of entries, such assignment will be good.

(2) Where a debtor conveys lands to his creditor in trust to sell, and from the proceeds to satisfy the debt, and to pay the balance to the debtor, and the debtor dies without having paid the debt, and without having elected to take the land instead of its proceeds, his personal representative is the proper party to compel the execution of the trust by a sale of the lands. *Craig v. Jennings*, 31 Ohio St. 84.

After such trust has been executed by a sale under a decree, at the suit of the administrator, it is too late for the heir to elect to take the lands. Ib.

If such a sale be tainted by the fraud of the purchaser, it is for the administrator, and not for the heir, to impeach it on that account. Ib.

(3) A testator devised his estate to his five children, in equal shares, and authorized his executor to sell and convey all the real estate of which he died seized. A creditor of one of the devisees caused an attachment to be levied on an individual fifth part of said real estate. Afterward the executor, in execution of the power, sold and conveyed all said real estate: *Held*, that the purchaser acquired title to the land conveyed, unaffected by the levy of the attachment. *Smyth v. Anderson*, 31 Ohio St. 144.

CHAPTER VIII.

THE ACCOUNT OF THE EXECUTOR OR ADMINISTRATOR;
AND THE DISTRIBUTION OF THE ESTATE.

SECTION I.

WHEN AN ACCOUNT MUST BE RENDERED ; WHAT IT MUST CONTAIN ;
HOW THE FILING OF THE SAME MAY BE ENFORCED ; AND THE
COMPENSATION OF THE EXECUTOR OR ADMINISTRATOR FOR
HIS SERVICES.

It is specially enjoined upon an executor or administrator by law to use all reasonable diligence in collecting and converting into money the assets of the estate, and, if possible, to pay the claims against the same and make settlement of his account (89) within eighteen months from the date of his bond. Should circumstances compel him to ask for an extension of time for the collection of assets, he is nevertheless required to file an account at the expiration of the eighteen months, and to report to the court the progress he has made in the settlement of the estate. In case further time should be allowed, an account must be filed every twelve months after the filing of the first, and at such other times as the executor or administrator may be required so to do by the probate judge, until the estate is fully settled.^a

The allowance of further time to collect assets will not operate as an allowance of further time to file the accounts required, and will not exempt an executor or administrator from a citation to file an account at any time when it may appear to the probate judge to be necessary.^b

When an executor or administrator has died before the estate is fully administered, the law makes it the duty of the executor or administrator of such deceased executor or administrator to

(a) § 6175.

(b) § 6177.

render a final account of such decedent's administration within six months after his appointment.^a

Every executor or administrator will be chargeable with the amount of the sale bill, as hereinbefore provided, and also with all goods, chattels, rights, and credits of the deceased, which shall come to his hands, and which are by law to be administered, although they should not be included in the inventory or sale bill; also with all the proceeds of real estate, sold for the payment of debts or legacies, and with all the interest, profit, and income that shall in any way come to his hands from the personal estate of the deceased.^b

In rendering an account (89), the executor or administrator should therefore charge himself with the entire amount of the sale bill in gross, without entering separately the several sums he may have received in cash upon the day of sale, or upon the sale notes subsequently.

He must also charge himself with all moneys collected by him upon any claims due the estate, including any indebtedness of his own to the decedent,¹ whether such claims be mentioned in the inventory or not, naming the dates when the several amounts were received, and entering principal and interest separately.

Also the avails of any personal property sold at private sale, and the proceeds of real estate sold by order of court or the will of the decedent, together with the interest received by him upon deferred payments.

Also any interest received upon the sale notes and upon moneys of the estate deposited in bank or loaned by the executor or administrator, or used by him in his own business.

(1) When the obligor in a bond becomes administrator of the obligee, the bond is suspended, and the debt becomes assets in the hands of the obligor as administrator. *Bigelow's Ex'rs v. Bigelow's Adm'rs*, 4 Ohio, 138.

An executor or administrator who is indebted to the estate upon a claim due the decedent in his lifetime, is bound to account for the amount so due from him as for so much money received, and is liable to an action upon his bond, by the administrator *de bonis non* of the decedent, or by any other person to the payment of whose claim the amount so due from the executor or administrator would be applicable. *Tracy's Adm'x v. Card*, 2 Ohio St 431.

(a) § 6175.

(b) § 6179.

Also, any moneys received by him from a former administrator, or from the executor or administrator of any other estate in which the decedent had an interest as heir or legatee; together with any sums paid to the executor or administrator by a late partner of the decedent as the avails of the partnership business.

If any executor or administrator shall neglect to sell any portion of the personal property which he is bound by law to sell, and retains, consumes, or disposes of the same, for his own benefit, he will be charged therewith at double the value affixed thereto by the appraisers.^a

No profits¹ shall be made by executors or administrators, by the increase, nor shall they sustain any loss by the decrease or destruction, without their fault,² of any part of the estate.^b

No executor or administrator shall be accountable for any debts, inventoried as due to the deceased, if it appear to the court that they remain uncollected without his fault.^c

But he is entitled to a deduction for loss only upon making satisfactory proof to the court that he exercised due care in taking security upon the sale notes; that subsequently the principal and sureties in the notes on which the loss occurred became insolvent; and that he made every reasonable effort to collect the amount of such note or notes, but failed therein.

He is not chargeable with interest upon money in his hands, unless he apply the same to his own use, or derive some benefit from the loan of it; or unless he unreasonably and unnecessarily delay the closing up of the affairs of the estate.³

An executor or administrator is entitled to credit in his account for all payments by him legally made in behalf of the estate. These include expenses of last sickness and funeral of the decedent; costs of administration (including expenses incurred in cutting, threshing, and hauling grain, removing and taking care of personal property, etc.); allowance to the widow and children; taxes; ordinary debts; legacies; notes and other effects distributed in kind, as mentioned on page 127; and, in

(1) See notes 39-42, pp. 342-343. (2) See notes 1, p. 162.

(3) Cooch et al. v. Cooch's Adm'r, 7 Ohio St. 22.

(a) § 6182.

(b) § 6180.

(c) § 6181.

short, any payment authorized by law or the will of the decedent.¹

He is also entitled to credit for the amount of the compensation allowed by law for his services. But it is not a good practice to enter the compensation in the account; as it is seldom that the amount remains unchanged by the probate judge; and, in case an alteration should be made, a discrepancy will appear between the account and the finding of the court. It is the duty of the probate judge to determine, under the law, the amount of the compensation to which the executor or administrator is entitled; and therefore a mere memorandum on the credit side of the account, that the accountant claims the ordinary legal compensation or commission will be sufficient.

As compensation for their services, executors or administrators are allowed by law the following commissions upon moneys received and accounted for by them:^{2a}

(1) An executor or administrator with the will annexed is not bound to assume the defense of a will in proceedings brought by the heirs to contest its validity; and can not charge the estate, on the settlement of his account, with the costs of such defense in case the will should be set aside. *Andrews' Ex'rs v. Andrews' Adm'rs*, 7 Ohio St. 143.

(2) Where the testator directed certain legacies to be paid by his executors, and devised certain lands to A., charged with the payment of the legacies and costs of administration, so far as funds might be needed by the executors for the payment of the same, and A. paid and took receipts from the legatees, and tendered the amount of costs of administration to the executors, exclusive of any per cent. on the legacies, it was held that in such case the executors are not entitled to a per cent. on the legacies. Whether, however, in seeing to the discharge of the legacies, the executors performed extraordinary services, not in the common course of duty, was a matter for the consideration of the probate court, on settlement. *Williams v. Williams' Ex'r*, 8 Ohio St. 300.

Where executors, by valuable services, procured the settlement of a large debt, amounting to over \$300,000, due by the estate to mortgagees, by inducing the latter to accept as satisfaction the release of the equity of redemption, which was very advantageous to the estate, and the court allowed the executors as compensation the maximum legal commission on the whole amount of the debt, although only about \$3,000 in cash was actually handled, this court, though regarding commissions so given as a strained construc-

(a) § 6188.

Upon the first thousand dollars, at the rate of six per centum ;

Upon the next four thousand dollars, four per centum ;

Upon the balance, two per centum.

These commissions are allowed upon the proceeds of lands sold by order of the court or by will, as well as upon the personal estate converted into money. But when the provision is made in a will for the compensation of an executor or administrator, he can not claim the commissions allowed by law unless he first, in writing, renounce to the court any claim to the compensation provided by will.^a

In addition to the commissions mentioned, an executor or administrator will be entitled to such further allowance as the court may deem just and reasonable for his actual and necessary expenses, and for any extraordinary services not required of him in the common course of his duty. To obtain such additional allowance, the person claiming the same must satisfy the court, by his own affidavit or otherwise, as the court may direct, that the amount claimed is reasonable, and that the same is justly due him for his expenses and extraordinary services, in addition to the compensation fixed by law.^a

Where more than one account is filed by an executor or administrator, the rule for the allowance of commissions remains unchanged. Upon the filing of the second or any subsequent account, the computation is taken up where left by the preceding account, and the money contained in the preceding account or accounts is added to what is subsequently accounted for, and the computation of the commissions is made as though the moneys were all comprehended in one account. For example : If an estate amount to six thousand dollars ; and in the first account nine hundred dollars be accounted for ; in the second four thousand dollars, and in the third and final one eleven hun-

tion of the statute then in force (2 Chase, 1309, § 8), and as excessive, yet refuse to interfere, such allowance having been on record without complaint for upward of twenty-five years, during which time final settlement was had by agreement between the executors and all the heirs, except two minors, without objection to the charge. *Piatt v. Longworth's Devisees*, 27 Ohio St. 159, 183.

(a) § 6188.

dred dollars; on the settlement of the first account the commissions would be six per cent.; of the second, six per cent. on one hundred dollars, and four per cent. on three thousand nine hundred dollars; and of the third, four per cent. upon one hundred dollars, and two per cent. on the residue.

But an executor or administrator may claim compensation for extra services, upon the filing of every account.

An executor or administrator who fails to file an account within thirty days after he is notified to do so by the probate judge, can get no compensation for his services unless the judge enter upon his journal that the delay was necessary and reasonable.^a

As to claims due to the executor or administrator from the estate of the decedent, see Chapter VI., pp. 112-115.

As to allowance for tombstones for deceased,^b see p. 127.

If the estate be insolvent, the executor or administrator should proceed as rapidly as possible to collect the assets and pay the preferred claims against the same; and after having done so, he should file an account of his proceedings, and obtain an order of court declaring the probable insolvency of the estate. But should the assets be sufficient to pay the preferred claims only, the executor or administrator may, upon payment of such claims, file a final account without representing the estate to be insolvent, or obtaining an order declaring such insolvency.^c

An executor or administrator can not claim credit for any uncurrent, counterfeit, or worthless money taken by him in the course of his administration, but must himself suffer the loss. The loss will also fall upon him in case he receives current bank bills, and fails to pay them over to creditors or heirs with proper diligence, and such bills subsequently become worthless. Extreme care is necessary to avoid liability for loss in such cases.

If an executor or administrator deposits money *in his own name* in a bank, and the money is lost by the bank's failure, or otherwise, he will be personally responsible for such money. But if he, *as executor or administrator*, deposits it in a bank in

(a) §§ 5996, 6006.

(c) § 6112.

(b) § 6185.

good credit and repnte, till the time arrives for paying it to creditors, devisees, etc., and the bank fails, he will not be responsible. He must act in regard to this as a prudent man would in his own affairs, and must keep the account of such funds separate from the account of his own.¹

Payments made to legatees under the provisions of a will are proper items of credit to an executor or administrator in his account ; but payments made to heirs upon their distributive shares of the estate, before the final settlement of the estate, should not be incorporated in the account. It is the duty of the probate judge, in examining the account, to determine how much of the estate is subject to distribution among the heirs ; and whether the money has already been distributed, or still remains to be distributed, is a matter in which he has no concern. His duties and powers cease with the order directing distribution to be made, according to the will or the law,² of the amount remaining in the hands of the executor or administrator on final settlement.

But should the executor or administrator desire to satisfy the probate judge that he paid over to the widow and heirs, upon their respective shares of the estate, the surplus moneys in his hands as rapidly as the condition of the estate would permit, and that he should not be charged with interest upon any *apparent* balance remaining an unreasonable length of time in his hands, he may file a separate schedule of the payments made to such widow and heirs, and the vouchers in support thereof, with his account, for the inspection of the probate judge. But for no other purpose than for the adjustment of interest is a memorandum of payments made to heirs of any benefit in an account.

As all accounts are recorded, and are open to examination by heirs and others interested, and as an executor or administrator can not always be present to make such explanations as may be desired relative to the various items composing his debit and

(1) See notes 109-114, pp. 354, 355.

(2) *McLaughlin v. McLaughlin*, 4 Ohio St. 508. See also p. 165, and notes 43, 44, p. 343.

credit, it is well to give at the foot of the account explanations of all such matters as are not entirely plain to the comprehension of all persons. Such memoranda may serve an excellent purpose in after years, when minors interested in the estate arrive at full age, and the facts relative to many receipts or disbursements may have entirely escaped the memory of the accountant. The executor or administrator should bear in mind that the account is not for the eye of the probate judge alone, but that in most cases others are also to be satisfied of its correctness.

Before filing the account, the executor or administrator must make oath before the probate judge or some other person authorized to administer oaths generally, that the same is, in all respects, correct, a certificate of which oath must be written upon or attached to such account, and signed by the affiant (90).^a When an account is rendered by two or more executors or administrators, the court may, in its discretion, allow it, upon the oath of one, or may require that it be sworn to by all.^b

The executor or administrator is required to produce and file with his account vouchers for all payments by him made in behalf of the estate; but the probate judge may, upon settlement of the account, allow any items of expenditure not exceeding ten dollars each, nor two hundred dollars in the whole, for which vouchers can not be exhibited, upon the oath of the executor or administrator that such payments were actually made, and specifying when and to whom the same were made—provided such oath be uncontradicted.^c But as such allowance is discretionary with the probate judge, an executor or administrator should be prepared with satisfactory vouchers to prove *all* his payments, and thus guard against all contingencies.

If the executor or administrator has sold any personal property at private sale, by order of the court, he must make and file with his account an affidavit (90) that such private sale has been made after diligent endeavor to obtain the best price for the property, and that the sale reported is for the highest price that he could get for the property.^d

(a) § 6175.

(b) § 6176.

(c) §§ 6183, 6184.

(d) § 6412.

Upon filing the account and vouchers with the probate judge, his fees upon the same, together with any fees due him for previous official services, must be paid; and an executor or administrator should provide himself with funds for that purpose before handing in his account. No action will be taken upon the account until the fees are paid.

Executors or administrators sometimes suppose that upon filing an account a settlement takes place with the probate judge in the same manner that accounts are settled between private individuals, and that such settlement takes place forthwith; but such is not the case.

It is the duty of the probate judge to cause notice to be published in some newspaper of the county, of the filing of any accounts by executors and administrators, specifying the time when such accounts shall be heard, which must not be less than three weeks after the publication of such notice, at which time it shall be competent for said probate judge, for cause, to allow further time to file exceptions to said accounts; and the costs of such notice must be paid, if more than one account be specified in the same notice, in equal proportions by the executors and administrators respectively.^a

Upon the hearing of an account, whether exceptions be filed or not, the probate judge may require the executor or administrator to appear before him, and to submit to an examination, under oath, touching the account; and in case the probate judge should think proper, he may reduce such examination to writing, and after being signed by the executor or administrator, may file the same away with the papers in the case.^b

In case the executor or administrator should claim credit in his account for money due him from the decedent in his lifetime, and such claim should be disputed, the general rule is that he must make proof of its validity by evidence other than his own. He can then be a witness in his own favor only under the exceptional cases specially provided for by statute. These exceptions are fully given in Chapter XIV.

The court may, if it shall deem it expedient and proper, refer

(a) § 6402.

(b) § 6403

the account and the exceptions thereto, if any, to a special commissioner, appointed by the court for that purpose.^a

When the account of an executor or administrator is approved and allowed by the probate judge, it is his duty to order a distribution of the amount remaining in the hands of the accountant, according to law, or to the will of the decedent, as the case may be (92).^{1 b}

From an order of the probate court, settling the account of an executor or administrator, an appeal may be taken to the court of common pleas.^{2 c}

(1) The probate court has no power to enforce this order by execution. The object of the order is merely to lay the foundation for a suit upon the bond, or for other proceedings to compel the executor or administrator to make distribution of the balance found in his hands. Nor has the probate court power to determine, by a mere order of distribution, the respective rights of the heirs, legatees, or others entitled to a share in such distribution, or the several proportions thereof to which they are respectively entitled. *McLaughlin v. McLaughlin*, 4 Ohio St. 508. A settlement in the probate court is an *ex parte* proceeding, *prima facie* evidence only of correctness, and binding no rights except when made in conformity to law. *Muskingum Bank v. Carpenter*, 7 Ohio (pt. 1), 21. See also 20 Ohio, 310; 2 Ohio St. 431.

Sections 534,^d 536,^e and 542^f of the (old) code of civil procedure (these sections have been re-enacted, and are still in force) do not confer power on a probate court to modify or vacate its own orders previously made in the settlements of the accounts of executors and administrators. It is evident that section 534 has reference to judgment or orders in adversary actions or proceedings *inter partes*, and not to such as are *ex parte*, as in *habeas corpus*, nor where there are no parties in any proper sense, as in the settlement of an executor's accounts. The law makes ample provisions for the correction of the accounts of executors and administrators, and the remedies it supplies must be followed within the time and in the manner pointed out. *Johnson, Ex'r, v. Johnson*, 26 Ohio St. 357.

(2) Certain heirs sued an administrator, charging him with fraudulent settlement of account, unnecessary sale of real estate, and for at least \$6,000, which they claimed he ought to distribute. *Held*, that the parties

(a) § 6186.

(b) § 524.

(c) § 6407.

(d) § 5354, as corrected, 77 O. L. 42.

(e) § 5358.

(f) § 5365.

When an account is settled in the absence of any person adversely interested, and without actual notice to him or her, such person may file his or her exceptions to such account at any time within eight months after such settlement; and the account will be opened and re-examined so far as relates to the items excepted to. Upon settlement of an account filed by an executor or administrator, any accounts previously filed by him may be so far opened as to correct any error or fraud therein; except that any matter of dispute previously heard and determined by the court can not be again tried by either of the parties to the former proceeding, without leave of the court.^{1 a}

were not entitled to a second trial, but were entitled to an appeal. *Reed's Adm'r v. Reed*, 25 Ohio St. 422.

See Chapter XIV., as to the manner of taking appeal, and as to the bond of executors and administrators in such cases.

(1) Where the administrators had filed partial accounts, which had been settled by a competent court, and had thereafter made no further or final settlement with the court, but had settled all demands of creditors, and thereupon, at the request of the heirs, made a full and final settlement with the heirs in writing and under seal of all matters of administration, and thereupon surrendered to the heirs the remaining assets: *Held*, that as to all matters that would have been embraced in a final account by such administrators with the court, such settlement by the parties is final and conclusive, unless impeached; that as to all errors or mistakes in settling said partial accounts in court, which had been a matter of record for over twenty years, and must have been known to the heirs, such settlement is final and conclusive, unless impeached. *Piatt v. Longworth's Devises*, 27 Ohio St. 159.

That where the names of infants are signed to such final settlement, without lawful authority, they may, on coming of age, if not otherwise debarred, disaffirm the same, and compel the administrators to make final settlement in the proper court. Such infants have a plain, adequate, and complete remedy at law, as to all matters of account, and can not invoke the aid of a court of equity to correct errors or mistakes in such partial or final settlements until they have exhausted their legal remedy. *Ib.*

In an agreement between executors and heirs in lieu of a final account in court, where specified pieces of property are turned over by the executors to the heirs, and claims mutually relinquished, and it is expressed that this is a "full and complete settlement" of all matters that have been administered on, this language is not broad enough to cover a claim for a breach of

(a) § 6137.

The eight months allowed by the statute for the filing of exceptions seems to apply to persons who are under disabilities at the time of settling the account (as minors, insane persons, and others). Statutes of limitations apply to persons under disabilities, unless such statutes specially except such persons from the operation thereof.¹

Should an executor or administrator fail to file an account of his administration at the end of eighteen months from the date of his bond, and at such other times as the law or the probate court may require, he may be compelled² to do so in like manner as in the case of failure to file an inventory; and the same proceedings may be had to attach and discharge him, and the same power is vested in the probate judge to revoke³ his letters in case

trust outside the line of the executors, and not then known to the heirs. *Ib.* 197.

The administrator of T., who died insolvent, applied in 1853 to the probate court for, and procured an order to sell the lands of T. to pay debts. T. having left a widow and minor children, unmarried, and composing a part of his family, a homestead in said lands was set apart for their occupancy, by metes and bounds. All the remaining property of the decedent, both real and personal, was sold, and the proceeds applied to the payment of the debts against the estate, leaving a per centum of said debts unpaid. In March, 1876, the children of T. having arrived at full age, said administrator, by supplemental petition, applied to said probate court for an order to sell the premises so set apart for such homestead, for the purpose of paying the unpaid balance of said debts. *Held*, that the administrator was entitled to such order. *Taylor v. Thorn*, 29 Ohio St. 569.

An account rendered by an executor or administrator, and settled by the probate court, is not final, so as to bar further inquiry in regard to the assets of the estate in the hands of the executor or administrator, not accounted for or passed on. *McAfee v. Phillips*, 25 Ohio St. 374.

The settlement of an account of an executor or administrator by the probate court is conclusive, as against parties with actual notice of the settlement, of all matters set out and specified therein, and as to such matters the party rendering the account can not be required to account a second time, unless the same is impeached for fraud or manifest error. *Ib.*

Where such an account has been rendered and settled, the probate court may, at any time within the time limited by the statute, compel the executor or administrator to render a further account of any assets of the estate in his hands not settled in a former account. *Ib.* See notes 43-50, pp. 343-4.

(1) *Favorite v. Booher's Adm'r*, 17 O. S. 548; *Ib.* 554.

(2) See last paragraph of note 1, p. 166. (3) See note 1, p. 53.

of his failing to render an account within thirty days after being committed, or of his absconding or concealing himself for the purpose of avoiding the service of an order upon him; and the same power to grant new letters, and with like effect, as in the former case.^a

And if an executor or administrator residing out of the state neglect to render an account and settle the estate according to law, after being duly notified by a party in interest, or by citation of the probate court, the court may remove him and appoint another administrator in his place.^{1 b}

SECTION II.

THE DISTRIBUTION OF ESTATES, AND HOW SUCH DISTRIBUTION MAY BE ENFORCED IN CERTAIN CASES.

When a person dies, possessed of *personal*² property subject to distribution, and leaving no will, such property passes to his or her heirs in the following order: ^c

First. To the children of the intestate and their legal representatives. But if the intestate was a man, and left a widow and also a legitimate heir or heirs of his body, such widow will be entitled to the one-half of any sum so remaining for distribution not exceeding four hundred dollars, provided that such balance was not caused by the sale of real estate to pay debts,²

(1) The power to proceed against an executor or administrator by citation or attachment, for failing to make settlement of his account, becomes dormant after sufficient time has elapsed to bar a suit upon the administration bond. The rule that a technical or direct trust is not barred by the lapse of time is subject to several important qualifications, one of which arises where circumstances exist calculated to raise the presumption, from lapse of time, of a discharge or extinguishment of the trust. *Philips v. Ohio ex rel. Harter et ux.*, 5 Ohio St. 122. See note 2, p. 75.

(2) The surplus of the proceeds of real estate by an administrator is to be considered and disposed of as *real estate*, and the widow of the intestate is not entitled to any part thereof in her capacity as one of the distributees of the *personal* estate of the deceased. *Griswold v. Frink*, 22 Ohio St. 79. See also note 2, p. 154, and note 1, p. 106.

(a) § 6178.

(b) §§ 6130, 6178, 6047-6049

(c) §§ 4159, 4162, 4163, 6194.

and if more than four hundred dollars remain, her proportion of the same will be one-half of the first four hundred dollars and one-third of the residue.

Second. If there be no children or their legal representatives, such property shall pass to, and be vested in, the surviving husband or wife of the intestate.¹ But the ownership of such property by said husband or wife is limited to this extent, that if the last mentioned husband or wife shall die intestate, without issue, and possessed of any property so inherited from a former husband or wife, then such property shall descend, one-half to his or her brothers and sisters or their representatives, and the other half to the brothers or sisters of the husband or wife from whom the property came, or their personal representatives. But see 78 O. L. 107.

Third. If the intestate leaves no surviving husband or wife,

(1) In connection with this subject, see *Ferguson et ux. v. Stuart's Ex'r*, 14 Ohio, 140, and *Collier v. Collier's Ex'r*, 3 Ohio St. 369. A testator died without issue, and by his will devised to his widow his real estate and about seven thousand dollars worth of his personal estate, being all his personal estate except a few legacies of small amount. The widow, without electing to take under the will, died, leaving a will in which she disposed of the property devised to her. In an action by the brothers of the testator against the executor of the widow to recover the personal estate, it was held that if the widow, by reason of failure to make an election, was excluded from taking under the will, she would be entitled to said personal property as next of kin. *Gardner et al. v. Gardner's Ex'r et al.*, 13 Ohio St. 426.

Under the act of March 23, 1840, § 180, providing that "when the intestate shall have left any legitimate child, heir of his body, the widow shall be entitled to all the personal estate, as next of kin, which shall be subject to distribution upon settlement of the estate; and if the intestate shall have left such child, the widow shall be entitled, upon distribution, to one-half of any sum not exceeding four hundred dollars, and to one-third of the residue of the personal estate subject to distribution:" *Held*, that whether the intestate shall or shall not have left any child living, the title of the widow to her distributive share of the personal property accrues on the death of the intestate, subject only to the debts and incidental expenses to be first paid by the administrator. *Conger et ux. v. Barker's Adm'r et al.*, 11 Ohio St. 1.

The provision in the statute of descents in favor of surviving husband or wife of the intestate applies only to where the intestate died seized of the estate.* Hence, where a daughter dies before her father, her surviving husband can inherit nothing from her father's estate as her legal representative. *Lane v. McKinstry*, 31 Ohio St. 640.

such property shall pass to the brothers and sisters of the intestate, of the whole blood and their legal representatives.

Fourth. If there be no brothers or sisters of the intestate of the whole blood, or their legal representatives, such property shall pass to the brothers and sisters of the half blood and their legal representatives.¹

Fifth. If there be no brothers or sisters of the intestate of the half blood, or their legal representatives, such property shall ascend to the father; if the father be dead, then to the mother.

Sixth. If the father and mother be dead, the property shall pass to the next of kin, and their legal representatives, to and of the blood of the intestate.

Seventh. If there be no such next of kin, then such property shall pass to the State of Ohio, and it is the duty of the prosecuting attorney of the county where the letters were granted to collect the same and pay it to the treasurer of the said county, to be applied exclusively to the support of the common schools of that county.

(1) E. P. purchased lands and died intestate, leaving I. P. and J. P., his sons and heirs, and R., his widow, who married again. Before the birth or conception of issue of the second marriage, I. P. died intestate and without issue, being an infant. J. P. afterward died intestate and without issue. At the time of *his* death there was issue of the second marriage. *Held*, that within the meaning of the act of 1831, "regulating descents and the distribution of personal estates," I. P. was the ancestor of J. P., from whom a moiety of the land came to the latter, and that on the death of J. P. his half-brothers took that moiety. *Lessee of Prickett et al. v. Parker*, 3 Ohio St. 394. See also *Dunn v. Evans et ux.*, 7 Ohio (pt. 1), 169.

Grand-uncles and grand-aunts, when next of kin, will take in exclusion of children or grandchildren of deceased grand-uncles or grand-aunts. *Clayton et al. v. Drake et al.*, 17 Ohio St. 367.

A. died, leaving lands which descended to B., a posthumous child, leaving C., his widow and mother of the child, and surviving brothers and sisters. On petition of the administrator of A., the lands were sold by order of the probate court, and from the proceeds the value of the widow's dower interest was paid, and before distribution of the surplus B. died intestate, without lineal heir. *Held*, that as to the estate of A., the proceeds of the sale are to be regarded as *real* estate, but as to the estate of B. as *personal* estate; and after the payment of the debts of A., the surplus was subject to distribution as the *personal* estate of B., and belonged to C., the mother and legal representative of the intestate B. *Pence et al. v. Pence's Adm r et al.*, 11 Ohio St. 290.

The children of an intestate living at the time of his or her death are each entitled to an equal share of the balance of his personal estate, after deducting therefrom the widow's portion; but should any child of the decedent have died, leaving children, the children of such deceased child will be jointly entitled to the share which their deceased father or mother might claim were he or she still living.^{1a}

But when the children of an intestate are dead at the time of his death, and his only heirs are grandchildren, such grandchildren take in equal parts, and not according to the rights of their deceased parents. And so in other cases, when all the heirs of an intestate living at the time of his death are of *equal* degree of consanguinity to him, the estate passes to them in equal parts.

When the children of an intestate are all living at the time of his death, but afterward, and before the settlement of his estate, all die, leaving children, the children of such deceased children will take the estate according to the rights of their deceased parents, and not in equal parts, or *per capita*. And the same rule of distribution prevails in all cases where the heirs, *at the time of the death of the intestate*, are of unequal degree of relationship to him, but *subsequent* thereto, and *before the settlement of his estate*, such changes occur by the death of heirs that the remaining heirs, or those entitled to a share in the distribution of his estate, when the same actually takes place, stand equally related to him. In law, if not in fact, the estate of an intestate at his death passes to his heirs then living, whether such heirs be children, grandchildren, or others; and in case any of the heirs die before the settlement of the estate, those who claim through them will be entitled to no more than their several shares of the estate.

To illustrate: Suppose Richard Roe to have died intestate, and to have had, during his life, three children, John, James, and Mary, and all living at the time of his death; they would each take one-third of Richard's property subject to distribution. Suppose that John, leaving no issue, had died before Richard did: none of Richard's property would ever have vested in John, and James and Mary would each take one-half of it. Suppose that before Richard's death, John, leaving no issue, and James,

(1) See *Dutoit v. Doyle et al.*, 16 Ohio St. 400.

(a) §§ 4164-4167, 6194.

leaving three children living, had died, and that Mary, with five children living, had survived Richard; James' children would jointly take one-half of Richard's property, and Mary would take the other half. Suppose that Mary should die before distribution took place; James' children would each take one-third of one-half, and Mary's children each one-fifth of one-half of Richard's property. Suppose that all three of Richard's children had died before he did; then each of his grandchildren would take the one-eighth of his property.

The words "child" and "children," as used in the preceding four pages, are construed to mean the *legitimate child or children only* of a father; but a bastard can inherit from his mother, in a division or distribution of her personal or real estate;¹ and if there be any legitimate heirs of the mother, they and such bastard will inherit in equal parts. He may also inherit from any one to whom his mother, if living, would be an heir.^a

Where a bastard dies without leaving a widow or child, his mother may inherit from him, and should she be dead his estate will go to the relatives of his mother in like manner as if he had been legitimate.^a

When a child is born out of wedlock, and the father and mother subsequently intermarry and acknowledge such child as their offspring, it thereby becomes, for all inheritable purposes, legitimate.^b

When persons intermarry and the marriage is afterward for any reason annulled, the issue of the marriage are nevertheless legitimate.^b

Where a child has been adopted by proceedings in the probate court, according to law, it becomes an heir of the person by whom it was adopted, and entitled to a share in the distribution

(1) When a bastard is the only child of a woman killed by the carelessness of a railroad company, an action may be sustained for his benefit by the administrator of his mother, to recover damages for the wrongful act. See *Muhl's Adm'r v. Southern Michigan R. R. Co.*, 10 Ohio St. 272.

(a) § 4174.

(b) § 4175.

of his or her estate, to the same extent as if it were his or her own child, born in lawful wedlock.^{1 a}

Descendants of the intestate begotten before his or her death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate, and had survived him or her; but in no other case shall any other person inherit, unless living at the time of the death of the intestate.^b

When an intestate in his lifetime made advancements to his children or their descendants, in either real or personal property, the portions received by them respectively will be held to apply upon their several distributive shares of his estate. If the advancement was in real estate, the value of the same will be considered as part of the real estate to be divided; and if it was in money or other personal estate, it will be considered as part of the personal estate to be distributed; and if, in either case, it exceed the share of the real or personal estate that would come to the heir to whom such advancement was made, he or she will not be required to refund any part of the same, but will be required to account for the surplus as so much received upon his or her proportion of the other part of the estate. And should the amount of such advancement be equal to or exceed such heir's proportion of both real and personal estate, he or she will be excluded from any share in the distribution of the intestate's estate after his death, but can not be compelled to refund any portion of the money or property advanced, although the amount received by him or her should exceed the amount received by the other heirs upon final distribution of the estate. Should the value of the real or personal property advanced be expressed in a deed of conveyance or any other instrument of writing, or be entered in an account book of the decedent, or in a receipt of the

(1) The act of April 20, 1854, and the act of March 29, 1859; give to the adopted heir the legal status of a child of the adopter, and the statute requires him to be regarded as such child in tracing descent to or from him in the cases therein specified; but in cases which do not come within those acts, the operation of the statute of descents is the same as if such acts had not been passed. *Lathrop v. Young*, 25 Ohio St. 451.

person so advanced, the value or amount so indicated will be taken as the true value or amount, in adjusting the rights of the several heirs in the distribution of the estate: otherwise, an estimate must be made of the value of the property when the advancement was made.^{1 a}

When administration is granted upon the estate of a person residing and dying out of the state, but interested in business in the state, as partner or otherwise, the administrator, upon settlement of his account, must pay into the probate court of the

(1) Where a father, on making an advancement to one of his sons, took the son's receipt, in which the son acknowledged that the amount received was to be in full of all claims which the son should have in his father's estate after his death, as one of his heirs, and agreeing not to set up any claim as heir, etc., it was held that the son was not bound by such agreement after his father's death. *Needles' Ex'rs v. Needles et al.*, 7 Ohio St. 432.

A gift to a son-in-law, intended to be charged by the father against his daughter as an advancement, and not subsequently converted by him into a gift absolute, will be charged against her in the distribution of his intestate property, if she, knowing the fact and intention of the gift, shall have acquiesced therein. Such acquiescence may be shown by evidence of express assent, or inferred from facts and circumstances inconsistent with such knowledge and assent. *Dittoe's Adm'r v. Cluney's Ex'r*, 22 Ohio St. 436.

F. conveyed real estate to S. for \$17,000, \$5,000 of which was released by way of advancement to F.'s daughter, who was S.'s wife, and with her consent the deed was made to S. Subsequently S. reconveyed the same premises to F. for \$18,000, for a part of which F. gave his note to S. After death of S. and before said notes were paid, the widow of S. brought her action against her husband's administrator to recover the advancement. *Held*, that the action was properly dismissed. *Stump v. Stump*, 26 Ohio St. 169.

For other decisions relating more or less directly to advancements, see *Caylor's Ex'r v. Merchant*, 5 W. L. M. 194; *Williams v. Williams*, 3 W. L. M. 258; *Needles v. Needles*, 7 Ohio St. 432; *Thompson v. Thompson*, 18 Ohio St. 73; *Godell v. Taylor*, W. 82; *Miller v. Wilson*, 15 Ohio, 108; *Van Zant v. Davies*, 6 Ohio St. 52; *Creed v. Bank*, 1 Ohio St. 1; *Swihart v. Shaum*, 24 Ohio St. 432; *Painter v. Painter*, 18 Ohio, 247; *Myers v. Warner*, 18 Ohio, 519; *Putnam v. Putnam*, 18 Ohio, 347; *Stableton v. Ellison*, 21 Ohio St. 527; *Tremper v. Barton*, 18 Ohio, 418; *Overholser v. Wright*, 17 Ohio St. 157; *Williams v. Mears*, 2 D. 604, 614; *Hosmer v. Sturges*, 31 Ohio St. 657, in notes 53-58, pp. 344-346.

(a) § 4169, 4170, 4171.

county from which he derived his letters, any surplus of the estate remaining in his hands after the payment of the legal claims presented against the estate, for the benefit of the estate of the decedent in the state in which he resided at the time of his death.^a

Should a legatee within four years from the date of the administration bond demand payment of his legacy, the probate judge may, if he think fit, require (59) that such legatee first give bond (58) to the executor or administrator, with sureties to be approved by the judge, conditioned to refund the amount of such legacy, or so much thereof as may be necessary to satisfy any demands that may afterward be recovered against the estate, and to indemnify the executor or administrator against all loss or damage by reason of the payment of such legacy.^b

An executor or administrator is not liable for interest upon moneys found by the court to be in his hands for distribution, until a demand is made and he fails to pay.

Upon making payment to the widow, heirs, legatees, or other persons interested in the distribution of an estate, of the whole or any part of their several shares, the executor or administrator should take a receipt (93) from each, specifying the amount and object of the payment; and if a married woman be entitled to a share in such distribution, the better and safer practice is to take a receipt signed by her and her husband, upon making payment to either. And where there are minor heirs, a guardian should be appointed immediately, as no one but a guardian can legally receipt to the executor or administrator for moneys due them out of an estate. Should the appointment of a guardian be unnecessarily delayed, and the executor or administrator desire to be relieved of the moneys remaining in his hands, he may represent the facts to the probate court, and the court will, if necessary, use compulsory means to effect such appointment.

After having made distribution according to law or the will, as the case may be, and after having obtained the receipts of all persons interested in such distribution, the executor or administrator may, within one year from the time when the order of

(a) § 6013. See also p. 74.

(b) § 6128. See also p. 124.

distribution was made by the probate court, present to the court an account of such payments (94), with the vouchers; and upon being satisfied by the affidavit of the executor or administrator, and such other proof as may be required, that the payments were actually made as claimed, the court will record such account, and enter the final discharge of such executor or administrator; and such discharge will forever exonerate the executor or administrator and his sureties from further liability under the order of distribution, unless the administration account should subsequently be impeached for fraud or manifest error.^{1 a}

An impression seems to prevail that the mere reording of the receipts of heirs and legatees will operate as a discharge from liability under the order of distribution; but this is erroneous. There is no law giving such record the effect supposed. The only benefit to be derived from the reording of such receipts is to perpetuate the evidence of payment, and to guard against their loss; further than this such record has no effect.

Should any part of the money ordered to be distributed remain for six months unclaimed by the person or persons entitled to the same, the executor or administrator may, under the direction of the probate court (95), invest such money in stocks, or loan the same on bond and mortgage, as the court may deem best, to accumulate for the benefit of the person or persons entitled to the same.² Such investment must be made in the name of the judge of the court for the time being, and will be subject to the order of the judge and his successors in office, as provided below; and the person making such investment must file in the court a memorandum (96) thereof, with the original certificates, or other evidence of title thereto, which shall be allowed as a

(1) But where an executor or administrator, after final settlement, distributes the balance in his hands to a part only of the distributees, he is not exempt from suit at the instance of other parties interested in such distribution, even though the vouchers of such distribution be filed with and approved by the court. *Negley v. Gard et ux.*, 20 Ohio, 310.

(2) As to investing moneys detained in the hands of an executor or administrator, by legal proceedings, see ante, p. 127. See also p. 162.

(a) § 6190.

sufficient voucher for such payment, under the said order or decree.^a

When the person entitled to the money invested shall satisfy the court of his right to receive the same, the court shall cause it to be paid over and transferred to him (97).^b

The judge with whom such certificates or evidences of title are deposited, for the time being, and each succeeding judge to whom they shall come, and his sureties, shall be responsible for their safe-keeping and application, as provided in the two preceding paragraphs.^c

If an executor or administrator, within thirty days after an order of distribution is entered by the court, upon settlement of his accounts, fail to pay to any person¹ interested in such order of distribution as creditor, widow, heir, legatee, or otherwise, upon demand, his or her share of the money or property ordered to be distributed, such person may file a petition (98) in the probate court which made such order, briefly setting forth the nature and amount of his or her claim; and it thereupon becomes the duty of the probate judge forthwith to issue a citation (99) against such executor or administrator, setting forth the filing of the petition and the amount claimed by the petitioner, and commanding such executor or administrator to appear on some day to be named therein, which can not be less than twenty nor more than forty days from the date of such citation, to answer the petition, and show cause, if any he should have, why judgment and execution should not be awarded against him for the amount claimed to be due to the petitioner under the order of distribution. Such citation may issue to any county of the state, and may be served by the sheriff or other proper officer, as in the case of a summons.^d

But should such executor or administrator reside out of the state, the court may, upon being satisfied of the fact, order such non-resident to be brought into court by publication of notice in some newspaper printed in the county in which the petition is

(1) *Cram v. Green*, 6 Ohio, 429. See notes 43, 44, p. 343.

(a) § 6191.

(c) § 6193.

(b) § 6192.

(d) § 6195.

filed, and if none be published therein, then in some newspaper having a general circulation in such county, for six consecutive weeks previous to the time set for hearing the cause (100).^a

Unless good reason be shown for a continuance, the cause will be for hearing on the day mentioned in the citation or advertisement; and unless a good defense be set up and maintained by the executor or administrator, judgment (101) will be rendered against him, in favor of the plaintiff, for the amount due the plaintiff upon the order of distribution, with interest and costs of suit; and an execution will be awarded thereon as upon judgments in other cases. Such judgment will have a like lien, and an execution issued upon the same by the probate judge must be served and returned by the sheriff or other proper officer in like manner as judgments and executions in the court of common pleas.^b

If the amount due to any person under the order of distribution be uncertain or in dispute, depending upon the construction of any devise, bequest, conveyance, contract, or advancement, or upon any other question, the probate judge is authorized to hear and determine the same; and if necessary, in order to ascertain and fix the amount due the plaintiff in such petition, he may settle the rights and claims of *all* the parties interested in the order of distribution, and for that purpose may, if necessary, direct that all the parties so interested be made defendants to such petition, by amended or supplemental petition; and may require that notice be given them by citation or advertisement, in like manner as to the executor or administrator upon filing the original petition. And upon trial in such cases, the court may render judgment and award execution against the executor or administrator, and in favor of *all* the parties interested in such order of distribution, for the amounts due them respectively, and for costs of suit; unless the court should be of opinion that the costs should be paid out of the estate, or by the parties, when an order may be made accordingly.^c

Upon motion of any of the parties in interest the probate judge is required to reserve such cause for trial in the court of common pleas; and it is his duty to make a transcript of his

(a) § 6196.

(b) § 6197.

(c) § 6198.

proceedings in the case so far as the same has progressed, and forthwith to file the same, together with all the papers in his possession relating to the case, in the office of the clerk of the court of common pleas of the same county; and thereafter the cause will proceed in the court of common pleas in all respects as if the same had originally commenced there, as a civil action.^a

Any person interested in such order of distribution may, instead of proceeding in the probate court in the manner described, commence a civil action in the court of common pleas (as explained on pages 135-140), against the executor or administrator,¹ for his or her share of the estate ordered to be distributed; and the court may cause all the parties interested in such order to be made parties to such action, if necessary to a complete adjustment of their respective rights under the same, and may settle and determine such rights, and enter judgment and award execution thereon, as in other cases.^b

The sureties of an executor or administrator may be made parties to a judgment thus rendered against him in either the probate court or court of common pleas, by petition or action to be commenced and prosecuted in the same manner as against the executor or administrator in the original case. And where the executor or administrator in the original action has been notified of the pendency of the petition by advertisement in a newspaper, the sureties may, in an action against them, make any defense which the executor or administrator might have made in the original action.^c

When an executor or administrator is in doubt respecting any matter connected with the execution of his trust, or the estate or property to be administered, and the rights of the parties interested in the same, he may commence a civil action in the court of common pleas, making all persons interested in the estate, or

(1) Suit may be brought against an administrator by a distributee, individually, as for money had and received, without naming him as administrator. *Waldsmith v. Waldsmith*, 2 Ohio, 156; *Negley v. Gard et ux.*, 20 Ohio, 310.

(a) § 6199.

(b) § 6200

(c) § 6201.

the distribution of the same, parties thereto, for the purpose of obtaining the direction of the court in relation to the matter in doubt, in the same manner and as fully as was formerly allowed under the chancery practice of the court; and in case any executor or administrator, after being requested in writing by any creditor, legatee, distributee, or other party in interest, to bring such action, fail for thirty days so to do, then the party making such request may institute such suit.^{1a}

Appeals may be taken from the judgment of the probate court in any of the foregoing cases to the court of common pleas, as in other cases of appeal from the former court to the latter; and appeals may be taken from the judgment of the court of common pleas to the district court, to the same extent, and in like manner, as other appeals from the one court to the other; and bills of exception may be taken and allowed upon any decision of the probate, common pleas, or district court, in the proceedings mentioned, as in other cases.^{2b}

(1) An action brought for the mere purpose of obtaining the opinion of the court upon the construction of a will, can not be maintained in cases where no trust is involved. *Collins v. Collins et al.*, 19 Ohio St. 468.

When no trust is involved, and no advice or guidance to an executor or other trustee is required, parties claiming under or against a will can not maintain an action for the mere purpose of obtaining the court's opinion as to its meaning or legal effect. *Corry v. Fleming*, 29 Ohio St. 147.

A trustee who is also executor, there being two claimants to a fund, may ask the direction of the court. *First Presbyterian Society v. Same*, 25 Ohio St. 128, 133.

A trustee in doubt as to his powers, has a right to apply to a court of equity to define them, and give judicial sanction to his acts. *Wiswell v. First Congregational Church*, 14 Ohio St. 31.

See also p. 23, and notes there referred to.

(2) As to how appeals are taken, see Chapter XIV., Section 1.

(a) § 6202.

(b) § 6203.

CHAPTER IX.

RELATING TO INSOLVENT ESTATES.

SECTION I.

WHEN AND HOW AN ESTATE MAY BE DECLARED INSOLVENT; WITH
THE PROCEEDINGS IN INSOLVENCY.

If the entire estate, both real and personal, of a decedent, be required to pay the expenses of his last sickness and funeral, the charges of administration, the allowance to the widow and children, and other claims entitled to a preference over the ordinary debts of the deceased, the executor or administrator may make payment of such preferred claims and settle his account with the probate court without incurring any personal liability for so doing, even though he may not previously have represented the estate to the court as insolvent.^a

But should the real and personal estate of the decedent be more than sufficient to pay the preferred claims against the same, but insufficient to pay such preferred claims and the ordinary debts of the decedent of which the executor or administrator may have notice, the executor or administrator should at once make out a statement (102) showing the probable value of the estate applicable to the payment of claims of all kinds, and the amount of the preferred and ordinary claims of which he has notice, and file the same in the probate court of the county; and the court may, upon being satisfied that the assets will not be sufficient to pay the preferred and ordinary claims against the estate, make an order declaring such estate probably insolvent (103); and may at its discretion appoint two commissioners (103) to receive and examine such claims, or may allow the executor or administrator to proceed in place of such commissioners to perform the same duty.^b

(a) § 6111.

(b) § 6224.

In most cases the appointment of commissioners may be dispensed with, not only on account of the additional expense incurred by their appointment, but also by reason of the complication which necessarily ensues upon requiring creditors to present their claims in the first place to the executor or administrator for allowance; next to the commissioners for examination and allowance; and finally to the executor or administrator for payment. For 'convenience' sake, if for no other purpose, the adjustment of the claims in every respect should be left to the executor or administrator.

Should no commissioners be appointed by the court, the executor or administrator is authorized by law to proceed as commissioner to receive and audit the claims against the estate; and it is his duty to give immediate notice (104) of the insolvency of the estate, and therein to require creditors to present their claims to him for allowance within six months from the time (naming it) when the probable insolvency of the estate was declared by the court. Such notice may be given by posting the same up in several public places in the township in which the deceased resided at the time of his death, or in such other manner as the court, having regard to the situation of the creditors, may order.^a The best method, as a general rule, is to give notice by publication for four or six consecutive weeks in a newspaper published in the county.

After giving the notice the executor or administrator should proceed with all diligence to finish his collections, convert all the assets of the estate into money, pay the preferred claims, and if he has not already filed an account, prepare to do so before an order of distribution is made by the court. The insolvency of the estate does not affect the rights of persons holding preferred claims, and the executor or administrator not only *may*, but is *bound* to pay such claims as rapidly as funds come into his hands.^b Preferred creditors are not compelled to present their claims for allowance under the commission of insolvency.

The period of six months is allowed, after the estate has been declared insolvent, for creditors to present their claims to the

(a) §§ 6236, 6237.

(b) § 6090.

executor or administrator ; but this time may be extended by the court, if deemed necessary, twelve months—making the entire time allowed eighteen months. At the expiration of the six months, or of the additional time allowed, it is the duty of the executor or administrator to return to the court a list of the claims presented to him, stating the sum allowed on each, and specifying which, if any, have been disallowed (106).^a

Should any claim so presented to the executor or administrator be in whole or in part disallowed by him, and should the person holding such claim be dissatisfied with the disposition made of the same, it may, by agreement between the executor or administrator and the claimant, be referred to arbitration in like manner as claims originally presented to the executor or administrator concerning which doubts exist or disputes arise. But if not so referred, the claimant must bring suit upon his claim within three months from the time of such allowance, or if such claim be not due, then within three months from the time when the whole or any part of the same becomes due ; and if suit be not brought within the time limited, the claim will be forever barred.^b

Whether such disputed claim be tried by referees or by the court, costs may be awarded by the court or referees, as may be, against the creditor, or against the executor or administrator personally, or against the estate, as a part of the costs of administration, as shall seem just and equitable, according to the facts disclosed at the trial.^c

The judgment on the award, or in the suit upon the claim, mentioned above, must be rendered in the same manner, and with the same effect, as is provided in the case of an appeal from the award of commissioners.^d

If judgment on such disallowed claim be recovered, or be entered on the award of referees, no execution thereon can be issued against the executor or administrator, but the list of claims returned to him as commissioner must be altered, if necessary, so as to include such judgment.

Should it be deemed advisable to appoint two commissioners

(a) §§ 6226, 6239.

(b) §§ 6240, 6241.

(c) § 6242.

(d) § 6243.

to receive and examine claims against the estate, such commissioners, before entering upon the discharge of their duties, must be sworn to a faithful performance of the same (105). It is their duty to appoint convenient times and places of meeting to receive and audit the claims of creditors, and to give notice (107) of such sittings by posting up advertisements in some public places in the township in which the deceased resided at the time of his death; or in such other manner as the probate court may direct, having regard to the situation of the creditors of the estate.^a

Creditors are allowed six months from the time of the appointment of commissioners to present and prove their claims; and the court is authorized to grant such additional time for that purpose as may be deemed necessary in any particular case, provided the whole time allowed do not exceed eighteen months from the date of the commission.^b

A creditor who has presented his claim to the executor or administrator of the estate is not thereby excused from presenting the same to the commissioners for allowance.

The commissioners are empowered to examine, under oath (108) (109), (which oath may be administered by any one of the commissioners), claimants and such witnesses as may be produced before them by any person interested in establishing or refuting a claim.^c

Should any claimant refuse to take an oath, or to fully answer the questions that may be lawfully propounded to him by the commissioners, or by the opposing party or his attorney, the commissioners may disallow the claim; and if an appeal be taken from the award, the court may also disallow the claim if the claimant refuse to be sworn, or to answer the question legally asked him touching the same.^d And any person guilty of perjury on such examination, whether claimant or witness, will be liable to a prosecution for perjury, as in other cases of false swearing.

At the expiration of the time allowed for proving claims, the commissioner must return to the probate court a list of all the

(a) §§ 6224, 6225.

(b) § 6226.

(c) § 6234.

(d) § 6233.

claims that were presented to them, specifying the amount allowed upon such as were duly proved, and designating particularly such as were in whole or in part disallowed (110).

Should any person be liable as surety for the deceased, or have any other contingent claim against the estate which could not be proved as a debt under the commission, or before the executor or administrator as commissioner, he may present the same to the probate court after the return of the list of claims by the commissioners, or by the executor or administrator acting in their stead; and upon making proof to the court of the existence of such contingent claim, the court is required by law, upon ordering a dividend of the assets then ready for distribution, to direct the executor or administrator to retain in his hands a sum sufficient to pay such contingent creditor an equal proportion of such assets with the other creditors.^a

In case such contingent claim should become absolute within four years from the date of the administration bond, and its justice or validity be not disputed by the executor or administrator, the court may allow the same, and direct that it be paid out of the moneys retained for that purpose by the executor or administrator, in the proportion received by the creditors who have already been paid, so far as the same can be done without disturbing the former dividends. But should the claim be disputed by the executor or administrator, it may be proved before the commissioners previously appointed, or before others to be appointed by the court, in like manner as if it had been presented before a list of the claims was returned to the court; and, if allowed by the commissioners, such claim must be paid out of the moneys retained by the executor or administrator, as if the same had not been disputed; but if not allowed, the assets remaining in the hands of the executor or administrator must be distributed among the creditors whose claims were allowed, in proportion to the amount of their respective demands.^b

Any person whose claim shall be disallowed, in whole or in part, by the commissioners, and any executor or administrator who shall be dissatisfied with the allowance of any claim, may appeal from the decision of the commissioners to the probate

(a) § 6227.

(b) §§ 6228, 6229.

court; if the creditor appeals he must, within ten days after the decision, file with the commissioners a bond (111) to the executor or administrator, with surety, to be approved by the commissioners, in the sum of one hundred dollars, conditioned to pay all costs that may be adjudged against him on such appeal; the executor or administrator may appeal by giving notice (158) to the commissioners within ten days;¹ and, in case of an appeal, the court must, as soon as practicable, hear and determine the question as to the allowance or disallowance of the claim, and must adjudge the costs against the party failing on such hearing.^a

The law does not specify how the appeal is to be made, or how the proceedings before the commissioners are to be made known to the court. Under the provisions of law in force previous to September 1, 1878, such appeal was to be taken "in like manner as such parties might appeal from the judgment of a justice of the peace,"^b which implied the filing of a transcript of the proceedings, and of the bond and other papers, in the court. Probably the courts will generally decide, from analogous practice in all other cases of appeal, that at least such a transcript, or some written statement of facts made by the commissioners, must still be filed. But possibly the petition of the party appealing must now supply what the transcript formerly furnished. The petition should describe the claim, state who owns it, when and by whom it was presented to the commissioners for allowance, and that it was allowed (or disallowed) by them on a given day; that on a given day a bond, or notice, as may be, and of which a copy may be attached to the petition, was filed with the commissioners; and should pray the court to allow (or disallow) said claim as a valid claim against the estate mentioned, and for the costs.

Any person whose claim shall be disallowed by the commissioners, and who shall, by accident, mistake, or otherwise, and not by his own neglect, omit to claim or prosecute his appeal, as before provided, may, upon his petition and notice thereof to the executor or administrator, be allowed by the court to claim and prosecute his appeal, as provided on pp. 185, 186, upon such terms

(1) It seems that no bond is required of the administrator or executor on such appeal, whether he has already given bond or not. See pp. 220, 221.

(a) § 6230

(b) S. & C. 608, § 207.

as the court shall impose, if it shall appear by affidavit that justice requires a further examination of his claim. But no such petition will be sustained, unless it be presented within two years after the return of the commissioners, and within four years after the date of the administration bond, and before final distribution.^a

The courts will perhaps generally require the notice mentioned in the preceding paragraph to be given in the nature of a summons served by the sheriff, as in other actions. The manner of serving such notice is, however, discretionary with the judge, as the law provides that when notice of any proceedings in a probate court shall be required by law, or be deemed necessary by the probate judge, and the manner of giving the same shall not be directed by statute, the probate judge must order notice of such proceedings to be given to all persons interested therein, in such manner and for such length of time as he shall deem reasonable.^b The affidavit mentioned in the some paragraph must state the facts concerning the claim and the reason why the appeal was not prosecuted sooner. It is the province of the court to determine, from these facts and circumstances, and from the nature of the claim, whether or not justice requires a further examination of such claim. Should the claimant prepare a petition describing therein briefly and clearly the claim, and in like manner stating the facts and reasons above alluded to, and also ask the court therein to allow him to claim and prosecute his appeal, and to grant him such relief, and render such judgment in the premises as justice requires, and then make affidavit to the truthfulness of the various matters stated in the petition, the court would probably consider this a substantial compliance with the requirements of the law, and as being good and the most convenient practice.

Should any claim referred to on pages 185, 186, 187 be finally allowed, no execution therefor will be issued against the executor or administrator; but he must include it among the valid claims against the estate. Any costs awarded against the executor or administrator are to be charged by him as expenses of administration.^c Such were the specific provisions of the old law, and no

(a) § 6231.

(b) § 6406.

(c) S. & C. 606, § 207.

doubt that, from the general tenor of the law in force, such is still the case, unless otherwise specifically directed by the court.

The allowance of such appeal, and the judgment that may follow thereon, will not disturb any distribution that may have been ordered before notice of the petition, or notice of the intention to present the same shall have been given to the executor or administrator; but the debts, if any, proved and allowed in the case last mentioned, must be paid out of such assets only as may remain in or come to the hands of the executor or administrator after payment of the sums due on such prior order of distribution.^a

At the expiration of thirty days from the return made by the commissioners, the probate court is required to make an order distributing the assets of the estate among the creditors in such manner as circumstances may require (112); and if, before making such order, the court should have notice that any appeal has been taken from the decision of the commissioners, the order of distribution may be deferred until the determination of such appeal; or an order may be made for the distribution of the assets among the creditors whose claims have been allowed, leaving in the hands of the executor or administrator a sum sufficient to pay the creditor whose claim is disputed a proportion equal to what shall be paid to the other creditors.^b

Should the list of debts be returned by the executor or administrator, acting in the capacity of commissioner, a like order of distribution (112) must be made as when the return is made by commissioners appointed by the court; but the court may previously hear and determine any exceptions that may be filed by any person interested in the distribution, against the allowance of any claim which may be deemed to have been improperly allowed by the executor or administrator; and in case any suit be pending against the executor or administrator the court may defer making the order of distribution until the determination of such suit, or may order a distribution among the creditors whose claims have been allowed, leaving in the hands of the executor or administrator a sum sufficient to pay the creditor

(a) § 6232.

(b) § 6235.

whose claim is disputed an equal proportion of the assets with the other creditors.^a

The court, in ordering a distribution, should direct the executor to retain in his hands an amount sufficient to pay any costs or charges that may accrue in connection with his report under the order of distribution.

Before an order of distribution is made, the claims in favor of the estate should, as far as possible, be collected; the other assets, if any, be converted into money; the preferred claims against the estate be paid; and an account be rendered by the executor or administrator, showing the actual amount for distribution among ordinary creditors. By rendering a complete account in the first instance, the necessity for filing subsequent accounts and making sundry distributions will be obviated; and the executor or administrator will be exempt from annoyance on the part of creditors who have failed to perfect appeals, and from others who might, in case more than one order of distribution should be required, obtain the allowance of further time to prove their claims.

If the whole assets should not have been distributed upon the first order of distribution, or if further assets should afterward come to the hands of the executor or administrator, the court must make such further order or orders for the distribution thereof, as the case may require.^b

Should the executor or administrator, at the end of a year from the time of his appointment, proceed to pay the claims against the estate, as by law he is allowed to do in case the assets in his hands are sufficient to satisfy the claims of which he may then have notice, and all the assets of the estate should be exhausted in paying such claims, he is not bound to represent the estate insolvent in the event that other claims are subsequently, and before the expiration of eighteen months from the date of his bond, presented to him for payment.^{1 c}

But should the whole estate not be paid away at the time

(1) See also Chapter VI., Section I.

(a) § 6244.

(c) § 6109, 6110.

(b) § 6245.

when such subsequent claims are presented, and should the remaining assets be insufficient to pay the remainder of the debts of the deceased, it is the duty of the executor or administrator to represent the estate to the court as insolvent; and the same proceedings will be had with reference to the remainder of such assets and the debt remaining unpaid, as in other cases of insolvent estates. The distribution previously made will remain valid and final, and the creditors who have been paid can not be compelled to refund any portion of the amounts by them respectively received.^{1 a}

If, after having paid the claims presented previous to the expiration of the year, a balance remain in the hands of the executor or administrator, unappropriated, and a claim be afterward presented, amounting to more than such balance, the executor or administrator can be compelled to pay upon such claim only so much as may then remain in his hands; but if two or more claims be presented, amounting together to more than such balance, distribution must be made under proceedings in insolvency, as in other cases.^{1 a} But in most instances an amicable adjustment of the claims of such dilatory creditors, and a distribution of the assets according to their respective rights, can be made, without proceeding in insolvency; and if this be done with the consent of all the creditors interested, it will be valid and binding.

No action can be maintained against an executor or administrator after an estate has been declared insolvent, except it be for a demand that is entitled to a preference, and would not be affected by the insolvency of the estate, or unless the assets should prove more than sufficient to pay all the debts allowed by the commissioners, or unless a claim is presented and rejected, or disputed by the executor or administrator, before the estate is represented as insolvent, or unless the suit is brought against the executor or administrator, while acting in the place of commissioners, upon an estate represented to be insolvent, and upon a claim disallowed by such executor or administrator; and

(1) See also Chapter VI., Section I.

(a) § 6111.

if an estate is represented insolvent, whilst an action is pending against an executor or administrator for any demand that is not entitled to such preference, the action may be discontinued without the payment of costs; or, if the demand is disputed, the action may be tried and determined, and judgment may be rendered thereon, in the same manner and with the same effect as is provided in the case of an appeal from the award of the commissioners; or the action may be continued at the discretion of the court, until it shall appear whether the estate is insolvent, and if it should not prove to be insolvent, the plaintiff may prosecute the action as if no such representation had been made.^a

A creditor who fails to present his claim for allowance to the commissioners of insolvency, or the executor or administrator acting as commissioner, within the time allowed by law or the order of the court, will be forever barred from maintaining a suit to recover any portion of the same, unless further assets be received by the executor or administrator after the order of distribution, in which case his claim may be proved, allowed, and paid, in the manner and with the limitations prescribed by law in the case of contingent debts.^{1 b}

Should it appear upon the return of the list of debts by the commissioners, or by the executor or administrator, as the case may be, that the assets will be sufficient to pay all the debts that have been presented and allowed, the court will direct that such debts be paid in full; and if, after such order is made, any debts should be recovered against the executor or administrator, he will be liable only to the extent of the assets remaining after the payment of the debts proved and allowed previous to the order of distribution.^c

If there be two or more such creditors, the assets, if not sufficient to pay their demands in full, must be divided among them, in proportion to the amount of their respective debts.^d

In an action against the executor or administrator upon such claim, he may prove the amount of assets remaining in his

(1) See *ante* in this section.

(a) § 6246.

(b) § 6247.

(c) § 6248.

(d) § 6249.

hands, and although judgment may be entered in the usual form, execution can not issue for more than the amount of such assets; and if there be more than one judgment, the court will apportion the assets among them in proportion to their respective amounts.^a

If within three years from the grant of administration upon an estate which has been represented to be insolvent, the actual insolvency of the estate be not fully ascertained, any creditor whose claim shall not have been presented to the commissioners, or to the executor or administrator acting as such, may commence an action therefor against the executor or administrator; and such action may be continued on the motion of the defendant, until the solvency or insolvency of the estate be fully determined; and should the estate prove to be solvent, the action may proceed as if no representation of insolvency had been made.^b

If any executor or administrator shall neglect to render and settle his accounts (114) in court, within six months after the return made by the commissioners, or by the executor or administrator, in their place, or after the final liquidation of the demands of the creditors (113), or within such further time as the court may allow to collect the debts and assets, so as to delay an order of distribution, he may be compelled to render such account in the manner hereinbefore directed, to compel the return of an inventory;¹ and the same proceedings may be had to attach him, and to discharge him, and the like revocation of the letters granted to him may be made, in case of the party's absconding or concealing himself, so that no order can be personally served, or of his neglecting to render an account within thirty days after being committed; and new letters must be granted with the like effect, and like remedies on the administration bond, as in those cases.^c

The court must allow the commissioners such compensation as they may deem reasonable, for their services, which must be paid by the executor or administrator, as a part of the costs of administration.^d

(I) See Chapter III., Section VI.

(a) § 6250.

(b) § 6251.

(c) § 6252.

(d) § 6253.

CHAPTER X.

RELATING TO SUITS UPON THE BONDS OF EXECUTORS AND ADMINISTRATORS.¹

SECTION I.

WHEN AND HOW SUIT MAY BE BROUGHT UPON AN ADMINISTRATION BOND.

Suit may be brought upon the bond of an executor or administrator :

1. If he fail to proceed with due diligence to convert the personal estate of the decedent into money, or to sell real estate when necessary for the payment of his debts, in case an order of court can be obtained for that purpose; or if he neglect to apply the assets in his hands to the satisfaction of the claims against the estate; and if, by reason of such delay or neglect, the estate of the decedent be taken in execution by any of his creditors, it will be deemed unfaithful administration, and the executor or administrator will be liable upon his bond for all damages occasioned thereby.^a

2. When a creditor is entitled by law to the payment of his debt from the executor or administrator, and the amount of the claim has been admitted to be just, or allowed by him, or has been determined by judgment or award against him, or by an order of distribution, such creditor may, after demand made and

(1) See Chapter VIII. for other proceedings authorized by law to enforce the distribution of estates, and Chapter II. for other matters relating to such bonds.

(2) Such suit can not be brought before a justice of the peace. *Hackworth v. Robinson*, 31 Ohio St. 655. See also note 1, p. 337.

(a) § 6209.

a refusal to pay, bring suit upon the bond of such executor or administrator.^{1a}

(1) A creditor, legatee, widow, or other distributee can bring suit without first obtaining leave of the court. But such party must allege and prove his or her right to a sum *determinate* and *certain*, previously ascertained by allowance, judgment, or award; and, in addition, must prove a demand made after his or her right to payment has accrued. A creditor must aver and prove that an executor or administrator received assets applicable to the payment of his claim, before he can make a case under the 182d section of the law. Ohio, use of *Magie et al., v. Cutting*, 2 Ohio St. 1.

See notes, p. 99. L., being administrator of C., died without having settled his account with the estate. The administrator of L. filed in the probate court the account of L. as such administrator, to which the administrator *de bonis non* of C. filed exceptions, and the court, on hearing, found a balance due from the estate of L. to the estate of C. The administrator *de bonis non* of C. brought suit against the administrator of L. on the finding of the probate court, to recover the balance so due to the estate of C. *Held*, that the administrator *de bonis non* can not maintain an action, on such finding, against the representatives of the deceased administrator, but that he must seek his remedy, under the statute, on the administration bond of the decedent. *Christmas' Adm'r v. Lynch's Adm'rs*, 19 Ohio St. 392. See also note 1, p. 84, *White, Adm'r, v. Moe*, 19 Ohio St. 37, 41.

The petition in an action against an executor, upon a bond given by him as residuary legatee, for the payment of all the debts and legacies of the testator, under the fourth section of the act to provide for the settlement of estates of deceased persons, passed March 23, 1840, need not show a presentment of the claim to the executor for allowance or rejection, or other matter to allow the bringing of the action specified in the ninety-eighth section of the same act. *Stevens et al. v. Hartley*, 13 Ohio St. 525.

In an action on an administrator's bond, assigning as a sole breach of the bond unfaithful administration, in this, that the administrator has neglected and failed, on demand of payment of their claim, to bring lands belonging to the estate of decedent into market to raise money to pay plaintiffs' claim against the estate, it is a valid defense that plaintiffs have in their possession, as surviving partners of decedent, applicable to the payment of their claim, assets of the late firm, the one-third part of which is due the decedent, and sufficient in amount to liquidate the claim of plaintiffs. *Everett v. Waymire*, 30 Ohio St. 308.

As to how breach of bond, qualification to sue, etc., should be averred, or such averment objected to, burden of proof, manner of damages, etc., see *Gutridge v. Vanatta, Ex'r*, 27 Ohio St. 366; *Douglas v. Day*, 28 Ohio St. 175; *Shields, Adm'r, v. Odell, Adm'r*, 27 Ohio St. 398.

See 36 O. S. 181; *Ib.* 454.

3. Suit may also be brought by a legatee after he is entitled to the payment of his legacy, or by the widow or other distributee, to recover her or his share of the personal estate, after an order of court determining the amount due to him or her,¹ should the executor or administrator, upon demand made, refuse or neglect to pay the same.^{2a}

(1) Treasurer of Pickaway Co., use of, etc., v. Hall's Ex'r, 3 Ohio, 225.

An administrator *de bonis non* may maintain an action on the bond of the deceased administrator, without having the amount due to the estate he represents, from the deceased administrator, ascertained by the finding or judgment of a court before bringing the action. *Douglas v. Day*, 28 Ohio St. 175.

It is only when an action is brought on an administration bond by a creditor, legatee, widow, or other distributee, under sections 182 and 183 of the administration act, passed March 23, 1840 (S. & C. 566), that the plaintiff is required by the statute to allege and prove his right to a sum liquidated by allowance, judgment, order, or award. *Ib.*

Without legislative aid, an administrator *de bonis non*, whose predecessor's powers have ceased by death, can neither maintain an action against the administrator of the estate of the deceased administrator, nor can he enforce a settlement by him in the probate court of the deceased administrator's account with the estate he represents. *Ib.*

The only remedy afforded by the statute to such administrator *de bonis non* is an action on the administration bond of the deceased administrator. *Ib.*

The right to resort to the remedy provided by these sections (sections 182 and 183 of old law, but these sections, and section 184, mentioned below, have been re-enacted, and are the paragraphs of this chapter numbered 2, 3, and 4) is not dependent upon the leave of the court, but the plaintiff must have a right to a sum determinate and certain, and the recovery is for his sole benefit. The suit authorized by the 184th section can only be resorted to by leave of the court, and must be for a breach of the bond in some other particular than is provided for in the two preceding sections. *Dawson v. Dawson*, 25 Ohio St. 443, 449.

A legatee or distributee can not maintain an action on the bond against the executor or administrator for payment of his legacy or distributive share under said section 183, within the four years allowed by law for creditors to present their claims, without an order of the probate court requiring such payment. *Ib.* See also notes 1 and 2, p. 196.

(2) Where an executor or administrator, after final settlement, distributes the balance in his hands to a part only of the distributees, he is not exempt

4. When the probate court¹ is satisfied, on the representation of any person interested in the estate of the decedent, that the executor or administrator has failed to perform his duty in any other particular than those specified in the foregoing divisions, the court may authorize any person aggrieved by such maladministration to bring suit on the bond.^{2a}

In actions upon the bond of an executor or administrator, for not filing an account when required by law or the order of court, the defendant may give in evidence any facts tending to show that he was not guilty of neglect or unreasonable delay in filing his account; and if such defense be made good, he will be entitled to recover against the plaintiff his costs. In no suit upon the bond of an executor or administrator for failing to file an account can the plaintiff by law recover more costs than damages.^b

In case of the death, resignation, removal, or revocation of the letters of an executor or administrator, his co-executor or co-administrator, or any succeeding administrator, may maintain an action upon the bond of the executor or administrator whose powers have ceased, against any of the obligors thereof, or their

from suit at the instance of other parties interested in such distribution, even though the vouchers of such distribution be filed with and approved by the court. *Negley v. Gard et ux.*, 20 Ohio, 310. And where one of two or more executors or administrators has in his hands the balance remaining for distribution, an action may be maintained against him *personally*, as for money had and received, without joining his co-executor or co-administrator. *Ib.*

(1) Ohio, use of *Magie et al., v. Cutting*, 2 Ohio St. 1.

(2) Where the breaches alleged in the bond of an executor or administrator consist of his failure to return an inventory, and of his wasting and converting the assets to his own use, the action for such breaches should be brought for the benefit of the estate, and not for the benefit of a particular legatee or distributee. *Dawson v. Dawson*, 25 Ohio St. 443. See also note 8, p. 73.

In an action on an executor's bond by an administrator *de bonis non*, it is not necessary to obtain leave of court to sue. *Gutridge, Adm'r, v. Vanatta*, 27 Ohio St. 366, 369.

For other decisions relating to such leave of court, see note 1, p. 195.

(a) § 6212.

(b) § 6213.

legal representatives, for any breach of the conditions of such bond.^{1a}

When an executor or administrator, within this state, by misconduct or neglect of duty, forfeits his bond or renders his sureties liable, any person injured thereby, or who is by law entitled to the benefit of the security, may bring an action thereon, in his own name, against the executor or administrator, and his sureties,² to recover the amount to which he may be entitled by rea

(1) *O'Conner et al. v. Ohio*, use of *Potter's Adm'r*, 18 Ohio, 225; *Tracy's Adm'x v. Card*, 2 Ohio St. 432.

An executor or administrator, who is indebted to the estate upon a claim due the decedent in his lifetime, is bound to account for the amount so due from him, as for so much money received, and is liable to an action upon his bond by the administrator *de bonis non* of the decedent, or to any other person to the payment of whose claim the amount so due from the executor or administrator would be applicable. *Tracy's Adm'x v. Card*, 2 Ohio St. 431. See note 1, p. 72.

Where an estate has been fully settled, and all the moneys in the hands of the administrator have been paid over, in pursuance of an order of court, should a will be discovered subsequently to such settlement, the executor can not compel the former administrator to account for the money or property by him received and paid over. *Barkaloo's Adm'x v. Emerick et al.*, 18 Ohio, 268.

In an action on the bond of an executor, under the act of 1854 (S. & C. 619), which authorizes the action against any of the obligors, or "their legal representatives:" *Quære*, whether a suit may not be maintained against the devisees as well as against the executors of a deceased surety, and without being objectionable as a misjoinder. *Gutridge v. Vanatta*, 27 Ohio St. 370.

(2) In action against principal and sureties executed to an executor, who, as such executor, at the time, paid its full consideration to the principal, in money, an answer by the sureties that they entered into the bond for no other consideration than the promise and agreement of the executor to release them from a debt due to him in his own right, and that said promise to them had been broken to their injury, whereby the consideration upon which they entered into said bond had wholly failed, is bad on general demurrer. *Matthews v. Meek*, 23 Ohio St. 272.

The undertaking of a surety can not be extended beyond the terms of the contract into which he entered.

In an action against a surety, upon an executor's bond, describing the testator as *James L. Findley*, such bond can not, by parol evidence, be made

son of the delinquency. The action may be instituted and proceeded in on a certified copy of the bond, which copy shall be furnished by the person holding the original, on tender of the proper fee.^a

A judgment in favor of a party for one delinquency, does not preclude the same or other party from an action on the same security for another delinquency.^a

This action on the bond may be brought in the court of common pleas or superior court¹ of the county in which it was given, for the particular relief only to which the plaintiff is entitled, or it may be framed either in the petition or in any cross-petition filed in the case, with a view to a settlement of all matters for which the principal in the bond is accountable, and any heirs, devisees, legatees, widow, or next of kin, or others, who may be liable on account of assets having come into their hands, or who may otherwise be proper or necessary parties,² may be made defendants; and when the action is framed for that purpose, and the necessary parties are before the court, the court may adjust and settle the estate in whole or in part, rendering all judgments required,³ and may award costs as may be deemed proper.^b

When it is brought upon an administration bond, by a creditor whose claim has been allowed or admitted by the executor or administrator, such allowance or admission will not by law preclude the executor or administrator, or other defendants in the suit, from contesting such claim; and the validity and

applicable to the estate of *Joseph L. Findley*. *McGurney v. State*, 20 Ohio, 93.

(1) As to the court in which action had to be brought previous to September 1, 1878, see *Dawson v. Dawson*, 25 Ohio St. 443.

(2) Where one of two or more executors or administrators has in his hands the balance remaining for distribution, an action may be maintained against him *personally*, as for money had and received, without joining his co-executor or co-administrator. *Negley v. Gard et ux.*, 20 Ohio, 310; *Waldsmith v. Waldsmith*, 2 Ohio, 310.

(3) This includes a judgment or decree against any of the defendants, as heirs, next of kin, devisees, or legatees, or against the widow of the deceased, under the law requiring them to contribute to the payment of claims against the estate of the decedent in certain cases. See Chapter XI

amount of such claim may be determined by the verdict of a jury, if either party require it, and if not, the court may determine the same, or may refer the matter to a master commissioner, to inquire into the justice and amount of such claim.^a

Suits may also be brought against executors and administrators to enforce an order of distribution ; but as this has been already treated of in the latter part of Chapter VIII., it need not be repeated here.

Where there are two or more executors or administrators, and a bond has been given by them jointly, all will be liable for a breach of the conditions of the same by one of their number ; but where separate bonds have been given, each person will be liable for his own acts alone.

As a party seeking to enforce the bond of an executor or administrator will be compelled to employ an attorney, any instructions would probably be superfluous.

(a) § 6216.

CHAPTER XI.

RELATING TO CONTRIBUTION BY HEIRS, DEVISEES, AND
LEGATEES.

SECTION I.

WHEN AND HOW CONTRIBUTION MAY BE ENFORCED; WITH THE
LIABILITY OF HEIRS, DEVISEES, AND LEGATEES TO EACH
OTHER, IN CERTAIN CASES.

As hereinbefore stated,¹ a creditor whose claim does not become due, or whose right of action does not accrue until after the expiration of four years from the date of the administration bond, may present his claim to the court from which letters issued, at any time before the final settlement of the estate, and the court may direct the executor or administrator to pay such claim, in case the creditor discount the interest upon the same for the unexpired time, or may order the executor or administrator to retain a sufficient sum in his hands to pay such claim when the same becomes due.^a

But if such claim be not so presented, or if presented, be not allowed, such creditor may, within one year¹ after the claim becomes due (in case the estate should then be settled), bring an action,¹ in the common pleas or superior court, against the widow and heirs as distributees, and against the legatees and devisees of the decedent, upon such claim, and they will be liable to such creditor in an amount not exceeding the value of the real or personal estate received by them respectively under the provisions

(1) Pages 120, 121.

(a) § 6115.

of the will of the deceased, or in the distribution of his estate at law.^{1 a}

A married woman, minor, or an insane or imprisoned person, may bring the action at any time within one year after their several disabilities are removed.^b

When by the will of a testator it is provided that a certain portion of his estate, or certain of the legatees or devisees shall be made exclusively liable for the payment of his debts, the terms of the will must first be complied with;² and the persons or estate exempt from the payment of debts will be liable for only so much of such debts as can not be recovered from the persons or estates specially charged with the payment of the same.^b

When any portion of the real estate of a testator remains at his death undevise, such real estate must first be subjected to the payment of his debts before any portion of that which is devised can be taken for that purpose, unless, as before remarked, other provision be made in the will for the payment of the debts.^a

When any estate, real or personal, is taken from a devisee for the payment of debts of the testator, all the other devisees and legatees may be compelled to contribute toward making up the loss of the person from whom the estate is taken, so as to make

(1) The record of a judgment against an administrator, and the return of "*nulla bona*" upon an execution issued thereon, is not sufficient evidence in an action against the heir to subject his real estate to the payment of the ancestor's debt, to show the want of assets. *Donley's Adm'r's v. Donley's Guardian et al.*, 14 Ohio, 359.

A suit may be maintained under section 43 of the act of 1831 (3 Chase, 1784), upon a guardian's bond executed in November, 1839, for moneys of the ward received during that month and not accounted for, against the heirs of a deceased obligee, to the extent of the assets by them received, after final settlement by the administrator before the proper court, although an action had accrued upon said bond prior to the settlement, and no claim had been presented therefor to such administrator, if such suit could then have been sustained against the ancestor, were he living; even though such ancestor did not die until after the act of 1840 went into operation. *Cochran et al. v. Taylor*, 13 Ohio St. 382.

(2) See note 54, p. 345.

(a) § 6217, and first part of § 6218.

(b) § 6218; also §§ 4978, 4986.

such loss fall on all the devisees and legatees in proportion to the value of the property received by them respectively.^a

If, in such case, the testator shall, by making a specific devise or bequest, have virtually exempted any devisee or legatee from his liability to contribute, with the others, for the payment of the debts, or if he shall, by any other provision in the will, have prescribed or required any appropriation of his estate, for the payment of his debts, different from that prescribed in the preceding paragraph, the estate must be appropriated and applied in conformity with the provisions of the will.^b

Nothing contained in the two preceding paragraphs will impair, or in any way affect, the liability of the whole estate of the testator, for the payment of his debts; but the provisions of these paragraphs will apply only to the marshaling of the assets as between those who hold or claim under the will.^c

When any part of the estate of the testator descends to a child born after the execution of the will, or to a child absent and reported to be dead, or to a witness to a will who is a devisee or legatee, such estate (and the advancement made to such child or witness) must, for all the purposes mentioned in the three

(1) Where a will gives pecuniary legacies, and provides that they and the debts of the estate shall be paid out of the personal assets and proceeds of real estate directed to be sold for that purpose, the legacies are not demonstrative, or in the nature of specific bequests, but are to be regarded as mere general pecuniary legacies. If the fund thus provided prove insufficient to pay the debts and legacies, the general pecuniary legatees can not compel contribution from specific devisees to equalize the loss arising from the deficiency. Such fund can not be applied to the payment of a debt secured by mortgage on land specifically devised, unless it be sufficient for the payment of all other debts and the legacies; and if so applied, when the fund is insufficient, must be refunded by the devisee. Specific devisees can compel contribution from each other, where the land devised to either is taken for the payment of debts which are not charged, or secured by mortgage or other lien upon the same. *Glass et ux. v. Dunn et al.*, 17 Ohio St. 413. See also note 1, *ante*, p. 15.

The debts of a decedent are a lien upon his real estate, and purchasers from his heirs take the same with this burden upon it, and subject to the maxim of *caveat emptor*. *Faran, Adm'r, v. Robinson et al.*, 17 Ohio St. 243

(a) § 5973.

(c) § 5975.

(b) § 5974.

preceding paragraphs, be considered as if it had been devised to such child or witness; and he will accordingly be bound to contribute with the devisees and legatees, as before provided, and will be entitled to claim contribution from them accordingly.^a

When any of the persons who are liable to contribute toward the discharge of such debt, according to the provisions contained in this chapter, shall be insolvent or unable to pay his just proportion thereof, or shall be beyond the reach of process, the others will be jointly and severally liable to the creditor or to each other, as may be, for the loss occasioned by such insolvency, each one in proportion to the value of the property received by him, from the estate of the deceased; and if any one of the persons so liable shall die, without having paid his proportion of such debt, his executors and administrators will be liable therefor, in like manner as if it had been his proper debt, to the extent to which he should have been liable if living: but no one can be compelled to pay more than the amount received by him from the estate of the deceased.^b

If, in the case of the payment of a claim to a creditor, there should be more than one person liable for the debt, the creditor shall recover the same by one action against all the persons so liable, or as many of them as are within the reach of process; and the court must thereupon determine, by the verdict of a jury, if either party require it, what sum, if any, is due to the plaintiff; and they must also decide, according to the equities of the case, how much each of the defendants is liable to pay toward the satisfaction of the debt, and render judgment accordingly.^c And all cases in which devisees or legatees may be required to contribute to make up the share of any child born after the execution of the will, or of a child absent and reported to be dead, or of a witness to the will, as well as those in which contribution is to be made among devisees, legatees, and heirs, or any of them, such cases may be heard and determined in a single action.^d

A suit so commenced by a creditor will not be dismissed or barred for a failure to include in the petition the names of all

(a) § 5976.

(b) §§ 5977, 6219, 6221, 6223

(c) § 6220.

(d) § 5978.

those who should have been made defendants; but the court may, at any stage of the proceedings, award proper process to bring in other parties, and may permit such amendments to be made as may be necessary to charge them, upon such terms as the court in its discretion may prescribe.^a

Nothing contained in this chapter shall prevent the court, when a sale of lands aliened or unaliened, by a devisee or heir, is ordered for the payment of the debts of the estate, to make such order and decree for the sale of any portion of the aliened or unaliened land, as may be equitable between the several parties, and also to make such order of contribution, and such further order and decree as will fully settle and adjust the various rights and liabilities of the parties, which arise by reason of the alienation or the order of sale, or otherwise.^b

Should the personal estate of a testator be insufficient to pay his debts, any articles of personal property by him specifically bequeathed are subject to sale by the executor or administrator, like other personal property of the deceased.^c

The discharge or release in a will of any debt or demand due the testator is not valid in law as against the creditors of a decedent, and the amount of such claim may be collected from the debtor, if it become necessary to do so in order to satisfy the claims of such creditors.^c

(a) § 6222.

(b) § 5979.

(c) § 6068.

CHAPTER XII.

RELATING TO CONTRACTS OF A DECEDENT IN EXISTENCE AT THE TIME OF HIS DEATH.

SECTION I.

WHAT CONTRACTS OF A DECEDENT AN EXECUTOR OR ADMINISTRATOR MAY ENFORCE, RESCIND, OR SPECIFICALLY PERFORM.

As a general rule an executor or administrator is the representative of the decedent in all contracts made by him in his lifetime, and remaining in force at the time of his death; and may sue or be sued in his representative capacity for any breach of such contracts occurring in the lifetime of the deceased, or subsequent thereto. But this rule is subject to exceptions; as, for example, an executor or administrator can not compel the specific performance of a contract for the purchase of lands entered into by the decedent in his lifetime; nor can he sue or be sued upon the covenants of warranty in a deed (unless the breach occurred in the lifetime of the decedent); nor upon a contract to marry, or any other contract which is extinguished or absolutely determined by the death of the party with whom the same was made. (See pp. 92-96.)

When a decedent in his lifetime enters into a contract for the purchase of real estate, and dies without paying the purchase money, his executor or administrator may, with the consent of the surviving party to the contract, and with the approval of the probate court, rescind the same, when such rescission is manifestly for the benefit of the estate and the heirs.¹

(1) Howard et al. v. Babcock et al., 7 Ohio (pt. 2), 73; Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1. Where land was conveyed by absolute deed, but there was a collateral contract, showing that it was intended as a

And the same rule applies in the case of personal contracts.¹

When a person who has entered into a written contract for the sale and conveyance of an interest in land dies before the completion thereof, and his executor, administrator, or other legal representative, desires to complete the contract, he may file a petition (115) therefor in the court of common pleas or probate court of the county in which the land, or any part thereof, is situated; if the petition be filed in the probate court, service may be made therein as in civil actions; and the heirs at law, devisees, or other legal representatives of the deceased vendor, when not plaintiffs, must be made defendants in the action.^a

It appears to be the intention of the law to encourage, if not to require, all proceedings in this behalf to be conducted as in a civil action, whether the petition be filed in the probate court or court of common pleas. That it authorizes this course is certain.^b That it authorizes any other course is at least doubtful.

The steps to be taken and the measures necessary to bring the parties defendant into court, so that they will be bound by the judgment of the court in such an action, are the same as those described in Chapter VIII. of this volume, in case of an action for the sale of real estate to pay debts.

security for a loan, and, the grantor dying insolvent before the loan became due, his administrators relinquished all claim to the land for the payment of debts, and directed the grantee to take the land for the debt, which, from the circumstances, it appeared he did, never afterward making any demand for the debt, and taking possession of the land which, in its then value, did not exceed the amount of the debt: *Held*, that the heirs at law, being adults, although two of them were married women, making no claim for the redemption of the land, until after the lapse of twenty-seven years, were, under the circumstances, precluded by the adjustment of the claims made by the administrators, and by the lapse of time, from any relief in equity. *Piatt et al. v. Smith's Ex'rs, et al.*, 12 Ohio St. 561.

(1) As a general rule, the personal representative may, in his discretion, perform or rescind any personal contract of his intestate imposing an obligation or duty upon him, as may be for the best interests of the estate, but subject, in general, to the approval of the court. *Mary Gray et al. v. Hawkin's Adm'r et al.*, 8 Ohio St. 449.

(a) § 5800.

(b) § 5800.

The waiver of a summons (67), the precipe (68), the directions for the sheriff (69), the affidavit to obtain publication (70), the petition (115), and the notice by publication (116), when notice is thus given, differ from those referred to in Chapter VIII., in substance only, not in form nor in the practice relating to them.

The court, after causing to be secured to and for the benefit of the estate of the deceased, its just part and proportion of the consideration of the contract, may authorize (117) the executor, administrator, or other legal representative, to complete the contract, and to execute a deed (118) for and on behalf of the heirs at law to the purchaser, which must recite the order (117), and will be as binding on the heirs at law, and all other persons interested, as if it had been made by the deceased in his lifetime.^a

The heirs at law or devisees of a person who purchased an interest in land by written contract, and died before conveyance thereof to him, may compel such conveyance as the deceased might have done.^b

The order of the probate court, in such cases, may be appealed from by any party in interest.^c

Neither the order of the court, nor the deed of the executor or administrator, will bar the widow of her right to dower in the premises described in the contract. Should the moneys received upon the contract be mingled with the other assets of the estate, and the widow receive a fair proportion thereof under the order of distribution, in equity she should be barred of her right of dower in the premises. Should she desire to relinquish dower, she may join in the deed of the executor or administrator, or may execute a separate deed to the purchaser.

In many cases, before an executor or administrator can sue for purchase money remaining unpaid upon a contract, he must make and tender a good and sufficient deed to the purchaser; or must show in the petition filed in the action that he is willing and able to make such deed. By making the purchaser and all the heirs of the decedent parties to the petition, and specifically setting forth the contract, a judgment might be obtained against

(a) § 5801.

(b) § 5802.

(c) § 6407.

the purchaser for the arrears of purchase money, and an order to make a deed, by one and the same proceeding. Where there is a widow entitled to dower in the premises described in the contract, and she refuses to relinquish the same to the purchaser, it is at least questionable whether the executor or administrator can enforce the contract.

CHAPTER XIII.

RELATING TO FOREIGN EXECUTORS AND ADMINISTRATORS.

SECTION I.

THE POWERS, DUTIES, AND LIABILITIES OF FOREIGN EXECUTORS AND ADMINISTRATORS WITHIN THIS STATE.

The several provisions of the law in force in this state, concerning the settlement of the estates of deceased persons, and also the remedies and proceedings therein given against executors and administrators appointed by the law of this state, shall apply to and be in full force and effect as to any foreign executor or administrator appointed by the laws of any other state, and residing in Ohio, or having assets or property in the same; and the several courts of probate and of record¹ shall have like power and authority over said foreign executor and administrator, the same as if appointed by the laws of this state.^a

Any court of common pleas or superior court in this state may compel any foreign administrator or executor residing in this state, or having assets or property in the same, to account, at the suit of any heir, distributee, or legatee, who is resident in this state, and may make distribution of the amount found in his hands to the respective heirs, distributees, or legatees, according to the law of the state granting said letters; and when there are suits pending, or any unsettled demands against said estate, the court may require a refunding bond to be given to said

(1) See Article IV., section 7, of the Constitution of Ohio.

(a) § 6130.

executor or administrator by the heirs, distributees, or legatees entitled thereto, in case the amount paid shall be needed for the purpose of paying the debts of said estate.^a

When any foreign administrator or executor has wasted, misapplied, or converted any assets of said estate, or has insufficient property to discharge his liability on account of said trust, or his sureties are irresponsible, any distributee, heir, or legatee may compel him, in any such court, to secure the amount that may be respectively due to them as aforesaid, and any of his sureties may require indemnity on account of their liability as bail, and the several provisional remedies and proceedings authorized in said courts shall apply to the person and property of said administrator and executor, and said court shall have full power and authority to make an order or decree touching his property and effects, or the assets of said estate, necessary for the safety and security of those interested therein.^b

An executor or administrator duly appointed in any other state or country may commence and prosecute civil actions in any of the courts of this state, in his capacity of executor or administrator; but in case he should not have given bond within this state, he will be compelled to give security for costs in like manner as other non-resident plaintiffs.^{1 c}

When an executor or administrator is appointed in any other state, territory, or country to settle the estate of a person dying beyond the limits of this state, he may, if there be no executor or administrator of such decedent appointed within this state, file an authenticated copy of his appointment in the probate court of any county in which there may be any real estate of the deceased, together with an authenticated copy of the will, if there be one; after which he may be authorized, under an order of the court, to sell real estate for the payment of debts or legacies and charges of administration, in the same manner and upon the same terms and conditions as are prescribed in the case of

(1) A foreign executor who has given no bond in this state, and is a non-resident, can not appeal a case without giving bond and security. *Work v. Massie's Ex'rs*, 6 Ohio 503.

(a) § 6131.

(b) § 6132.

(c) § 6133.

an executor or administrator appointed in this state, excepting in the following particulars :^a

Such foreign executor or administrator may file an authenticated copy of his original administration bond in the court granting the order of sale, and should the court be satisfied that the sureties and amount of such bond are sufficient to secure the proper disbursement of the proceeds of such sale, no additional bond will be required of him ; but in case such bond should be deemed insufficient, such executor or administrator will be required, before making a sale to enter into a bond (122) to the State of Ohio, in such sum as the court may direct, with two or more sureties, to be approved by the court (147, and note appended thereto), conditioned to account for and dispose of the proceeds of such sale in payment of the debts and legacies of the deceased, and the charges of administration, according to the laws of the state or country in which he was appointed.^b

When such foreign executor or administrator is authorized to sell more real estate than is necessary for the payment of the debts, legacies, and costs of administration, he will be required, before making the sale, to give bond (123) to the State of Ohio, in such sum as the court may direct, with sureties to be approved by the court (147) conditioned to account for all the proceeds of the sale that may remain after payment of such debts, legacies, and charges, and to dispose of the same according to the laws of this state.^{1 c}

(1) See note 1, p. 147. *Griswold v. Frink*, 22 Ohio St. 79, 90.

(a) § 6168.

(c) § 6170.

(b) § 6169.

CHAPTER XIV.

MISCELLANEOUS MATTERS.

SECTION I.

When the powers of an executor or administrator cease, either by death, resignation, removal, or by the revocation of his letters, during the pendency of a suit to which he is a party, such suit may be prosecuted by or against his successor, if any be appointed,¹ in like manner as if the same had been commenced by or against such new administrator.

The general rule of our law is that all suits must be brought in the name of the real party in interest; but an executor or an administrator may bring an action without joining with him the person for whose benefit it is prosecuted.^a All pleadings in such cases must clearly show that he is acting as such executor or administrator, and not for himself individually.

In suits or claims against an estate, the executor or administrator is not personally liable for costs, unless it appear that the claim upon which suit was brought was presented to him within one year from the date of his bond, and that its payment was unreasonably delayed or resisted, or that he refused to refer the same to arbitrators for adjustment; in any of which cases the court may adjudge the costs against him, personally, or against the estate, as circumstances and the proof may warrant.^b

When costs are adjudged against an executor or administrator in a suit brought to recover a demand in favor of an estate, they are a portion of the costs of administration, and should be paid accordingly. In order to prevent subsequent annoyance and expense, executors and administrators should pay all costs by

(1) A suit against the estate of a decedent can not proceed after the death of an administrator, until a new one is appointed, and he is made a party. *Heirs of Piatt v. Heirs of St. Clair*, 5 Ohio, 555. See also *Bustard v. Dabney et al.*, 4 Ohio, 68; *Mattoon v. Clapp's Adm'rs*, 8 Ohio, 248.

(a) §§ 4993-4995.

(b) § 6106

them in any way incurred in the settlement of estates, as rapidly as their finances will allow. The costs of administration stand in the first rank of privileged claims, and are entitled to payment in preference to claims of a lower grade;^a and an executor or administrator may, by carelessness in attending to the payment of such costs, render himself individually liable for them. The statute specially provides that the costs accruing upon a petition by an executor or administrator to sell lands to pay debts, shall be paid out of the proceeds of the sale, in preference to all other claims;^b and neglect to pay them will therefore be a breach of his bond.

An administrator has no power to create a trust.¹

An executor or administrator need not be sworn before entering upon the discharge of his duties.

The act of March 23, 1840, to provide for the settlement of the estates of deceased persons, does not apply to estates already settled or in the course of settlement when it took effect.²

Where a will directs that the administration of the decedent's estate shall proceed in a manner different in any respect from that established by law, as a general rule the terms of the will may with safety be followed by the executor or administrator. And so when the heirs, devisees, legatees, or others interested in the estate of a decedent, are all of full age, and the estate is solvent, many things may be done by the executor or administrator, with their unanimous consent, which by law he would not be authorized to do; as, for example, to apply the rents of real estate to the payment of debts;³ make distribution in a manner different from that prescribed by law, etc.

(1) *Piatt's Heirs v. St. Clair's Heirs et al.*, 6 Ohio, 227.

(2) *McGovney et al. v. The State*, 20 Ohio, 93.

(3) Where an administrator, by the advice of the family and friends of an infant heir, receives the rents of the real estate, and applies them in payment of the debts of the ancestor's estate, instead of selling the infant's lands for that purpose, and the arrangement is beneficial to the heir, his administrator can not afterward recover such rents from the administrator of the ancestor, although the arrangement has the effect to change the distribution of the infant's estate to the extent of the rents so applied. *Turpin's Adm'r v. Turpin*, 16 Ohio St. 270.

(a) § 6090.

(b) § 6165.

Should an executor or administrator, in the course of his administration, give a note to a creditor of the estate, he should be careful to state therein that the money is to be paid out of assets of the estate applicable to the satisfaction of such claim; otherwise he may render himself personally liable upon the note. To sign a note as "executor," or "as administrator" of the decedent's estate, will not be sufficient to exempt him from personal liability.

The promise of an executor or administrator to satisfy a debt of the deceased out of his own property is not binding, unless such promise is made in writing.^a

When a guardian dies without making settlement of his account, it is the duty of his executor or administrator to make such settlement, and upon his failing to do so may be cited and attached as in case of neglect to perform any other duty incumbent upon him. For filing such account the executor or administrator will be allowed such compensation as the probate court may deem reasonable.^b

Letters testamentary, or of administration, will not be issued to any person after his election to the office of probate judge and before the expiration of his term of office; and if any probate judge shall be interested as heir, legatee, devisee, or in any other manner, in any estate which would otherwise be settled in the county where he resides, all such estates in which said probate judge may be interested, must be settled by the court of common pleas of such county; and in all such matters and cases in which said probate judge is interested, the original papers connected with said estate must be by him forthwith certified to the court of common pleas as aforesaid. And in all other matters and proceedings, pending in any probate court, which would properly be disposed of or decided therein, but in which the probate judge thereof may be interested in any manner whatever, as attorney or otherwise, or in which he may be required to be a witness to a will, such probate judge must, upon the motion of any party interested in such proceedings, or upon his own motion, certify said matters and proceedings to the court of common pleas of the same county in which he resides and

(a) § 4199.

(b) § 6291.

he must forthwith file with the clerk of the court of common pleas of the same county, all original papers connected with said proceedings, and the same shall be proceeded in and heard and determined by the court of common pleas, at chambers, by any judge thereof, or in open court, in the same manner as though said court had original jurisdiction of the subject-matter thereof, and upon the final decision of the questions involved in such proceedings, or on the final settlement of the estate in which said judge is interested as executor, administrator, or guardian, by the court of common pleas, or whenever the interest of the probate judge therein shall cease, the clerk must deliver all said original papers back to the probate court, from which said papers came, and the clerk must, also, make out an authenticated transcript of the orders, judgments, and proceedings of said court therein, and must file the same in the probate court from which said papers came, and the judge thereof must record the same in the ordinary records of similar business.^a

A party can not testify where the adverse party is executor or administrator,¹ or claims or defends as heir, grantee, assignee, devisee, or legatee, of a deceased person, *except*—

First. To facts which occurred subsequent to the time the decedent, grantor, assignor, or testator died.

Second. When the action or proceeding relates to a contract made through an agent, by a person since deceased, and the agent testifies, a party may testify on the same subject.

Third. If a party, or one having a direct interest, testify to transactions or conversations with another party, the latter may testify as to the same transactions or conversations.

Fourth. If a party offer evidence of conversations or admissions of the opposing party, the latter may testify concerning the same conversations or admissions.

Fifth. In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with, or admissions by, a partner or joint contractor since deceased, unless made in the presence of the surviving partner

(1) See *Christmas' Adm'r v. Lynch's Adm'rs*, 19 Ohio St. 392; *In re Raab's estate*, 16 Ohio St. 273; *Brown v. Raft*, 1 H. 13; *Glen v. Hoffman*, 1 W. L. M. 506; *Thompson v. Same*, 2 W. L. M. 84; s. c., 18 Ohio St. 356, 263, 525; 14 Ohio St. 144; 16 Ohio St. 220; 17 Ohio St. 640; 18 Ohio St. 73; 21 Ohio St. 653, 658; 22 Ohio St. 208; 4 Ohio St. 513, 600; 1 Ohio St. 222; 17 Ohio, 156; 9 Ohio St. 558.

or joint contractor; and this rule must be applied without regard to the character in which the parties sue or are sued.

Sixth. If the claim or defense is founded on a book account, a party may testify that the book is his account book,¹ that it is a book of original entries, that the entries therein were made by himself, a person since deceased, or a disinterested person, non-resident of the county; whereupon the book will be competent evidence; and such book may be admitted in evidence in the case, without regard to the parties, upon like proof by any competent witness.

Seventh. If a party, after testifying orally, die, the evidence may be proved, by either party, on a further trial of the case; whereupon the opposite party may testify as to the same matters.

Eighth. If a party die, and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein. But nothing contained in this paragraph applies to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and where a case is plainly within the reason and spirit of this paragraph,² though not within the strict letter, its principles shall be applied.^a

The provisions of the preceding paragraphs apply to an execu-

(1) As to competency of stubs in check book in certain cases, see *Watts v. Shewell*, 31 Ohio St. 331.

In order to render a party incompetent as a witness in such cases, the parties must be adverse in *interest*, and not merely in their nominal *status* in the case as plaintiffs or defendants, and, therefore, in an action by an administrator upon a promissory note made by two parties defendant, where only one of them sets up any defense, the other is a competent witness for his co-defendant. *Baker et al., Adm'rs, v. Kellogg et al.*, 29 Ohio St. 663.

(2) The proviso in section 313 of the (now obsolete) code, as amended March 23, 1875 (72 Ohio L. 77, but now in force as the paragraph whence this reference is made), applied only to a case for setting aside a will or deed of a deceased person. The heirs, legatees, and grantees, who are declared competent witnesses by the proviso, are such as derive title from the same person; and where a person does not claim under a will or deed, he must, to come within this proviso, claim as heir of the testator or grantor, whose will or deed is sought to be set aside. *Mosher v. Butler*, 31 Ohio St. 188.

(a) § 5242.

tor or administrator who presents to the probate court for allowance, as contemplated in pages 112-115, any claim of which he, as an individual, is the owner, against an estate of which he is the executor or administrator.

In proceedings in probate courts all questions, except those arising in criminal actions and proceedings, unless otherwise provided by law, must be determined by the probate judge, unless, in his discretion, he shall order the same to be tried by a jury,¹ or referred, as provided for references in the court of common pleas.*

The provisions of law governing such references are as follows:

"A reference as provided (below) can not be ordered by a probate court, unless by consent of the parties to the reference and the referees.^b

"All or any of the issues in the action or proceeding, whether of fact or of law, or both, may be referred by the court, or a judge thereof in vacation, upon the written consent of the parties, or upon their oral consent in court, entered upon the journal.^c

"When the parties do not consent, the court, or a judge thereof in vacation, may, upon the application of a party, or of its or his motion, direct a reference in any case in which the parties are not entitled by the constitution to a trial by jury.^d

"If a referee die, or be disabled, or refuse to serve, a judge of the court in which the action is pending may, in vacation, appoint another person to take his place, or again direct a reference as provided in the two preceding sections.^e

"The trial by referees shall be conducted in the same manner as a trial by the court. The referees may summon and enforce the attendance of witnesses, administer all necessary oaths in the trial of the case, and grant adjournments, the same as the court; they must state the facts found, and the conclusions of law, separately, and their decision must be given, and may be

(1) See note 1, p. 79.

(a) § 6400.

(b) § 5215.

(c) § 5210.

(d) § 5211.

(e) § 5212.

excepted to and reviewed, in like manner; and their report upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report shall have the effect of a special verdict; and when the court directs it to be done, the referee shall reduce the testimony of the witnesses to writing, and require them severally to subscribe the same.^a

"In all cases of reference, except when an infant is a party,¹ the parties may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint referees, not exceeding three, who shall be free from exception.^b

"The referees shall sign any true exceptions taken to an order or decision by them made in the case, and return the same with their report to the court which made the reference.^c

"The referees must be sworn well and faithfully to hear and examine the cause, and to make a just and true report therein, according to the best of their understanding. The oath may be administered by any person authorized to take depositions."^d

The referees shall be allowed such compensation for their services as the court may deem just and proper, which shall be taxed as a part of the costs in the case.^e

Depositions taken according to the provisions of law for taking depositions to be used on the trial of civil causes, may be taken and used on the trial of any question before the probate court, where such testimony may be proper.^f

The fees of witnesses, jurors, sheriffs, coroners, and constables, for all services rendered in the probate court, or by order of the probate judge, shall be the same as is provided by law, for like services in the court of common pleas.^g

(1) It seems to follow from this and other paragraphs in this quotation, that no reference can be made by a probate court, if any party to the proceeding be a minor.

(a) § 5213.

(b) § 5214.

(c) § 5216.

(d) § 5217.

(e) § 5218.

(f) § 6404.

(g) § 6405.

When notice of any proceedings in a probate court shall be required by law, or be deemed necessary by the probate judge, and the manner of giving the same shall not be directed by statute, the probate judge must order notice of such proceedings to be given to all persons interested therein, in such manner and for such length of time as he shall deem reasonable.^a

The provisions of law governing civil proceedings in the court of common pleas, must, so far as applicable, govern like proceedings in the probate court, when there is no provision on the subject.^b

All undertakings and bonds, required or authorized by law to be given in the probate court, must be, on being accepted and approved by the probate judge, filed in his office.^c

APPEALS.—In addition to cases specially provided for, appeals may be taken to the *court of common pleas*, from any order, decision, or judgment of the probate court in settling the accounts of an executor or administrator; in proceedings for the sale of real estate for the payment of debts; in proceedings to increase or diminish the allowance made by appraisers of any estate to any widow or minor child or children for their support for one year; in proceedings against persons suspected of having concealed, embezzled, or conveyed away the property of deceased person; in cases for the completion of real contracts, and from order or decision in the administration of insolvent's estates by assignees, trustees, or commissioners; and in proceedings to appoint guardians or trustees for lunatics, idiots, imbeciles, or drunkards, by any person against whom such order, decision, or decree shall be made, or who may be affected thereby; and the cause so appealed must be tried, heard, and decided in the court of common pleas, in the same manner as though the said court of common pleas had original jurisdiction thereof.^d

The person desiring to take an appeal, as provided in the preceding paragraph, must, within twenty days after the making of the order, decision, or decree from which he desires to appeal,

(a) § 6406.

(b) § 6411.

(c) § 6401, am. 79 O. L. 127.

(d) § 6407.

give a written undertaking,¹ executed on the part of the person appealing, to the adverse party, with one or more sufficient sureties, to be approved by the probate judge, and conditioned that the party appealing will abide and perform the order, judgment, or decree of the appellate court, and will pay all moneys, costs, and damages, which may be required of or awarded against said party, by such court; when the order, decision, or decree, from which the appeal is taken, directs the payment of money, the undertaking must be in double the amount thereof, and in other cases, in such amount as shall be prescribed by the probate court; but when the person appealing from any judgment or order, in any court or before any tribunal, is a party in the fiduciary capacity, in which he has given bond within the state, for the faithful discharge of his duties, and appeals in the interest of the trust, he will not be required to give bond,² but must be allowed the appeal by giving written notice to the court of his intention to appeal within the time limited for giving bond.^a

The probate judge must, upon the giving of the undertaking, or notice, as aforesaid, make out an authenticated transcript of the docket or journal entries, and of the order, decision, or decree appealed from, which must be filed with the clerk of the court of common pleas, on or before the second day of the term of said court, next after an undertaking or notice is given, as hereinbefore provided, by the person appealing, and

(1) Such an undertaking, signed by sufficient sureties, is good without the signature of the appellant thereto; and where it is defective in omitting, by mistake, some of the conditions required, the court of common pleas has power to allow an amendment of the undertaking. *Johnson v. Johnson's Ex'r*, 31 Ohio St. 137.

(2) But if an executor or administrator has given no bond for the faithful discharge of his duties, even if excused from so doing by the will, he must give an appeal bond the same as other parties, whether he were appointed in this state or elsewhere; and the courts have no power to relieve him from this obligation. *Denison and Niel, Ex'rs v. Talmage*, 29 Ohio St. 433; *Roberts v. Wheeler*, W. 697; *Work v. Massie*, 6 Ohio, 503.

This bond need only be for double the amount of his interest. *Ewers v. Rutledge*, 4 Ohio St. 210, 216.

An executor or administrator being a defendant with other persons, if he appeals, the whole case is appealed, and no bond need be given. *Emerick v. Armstrong*, 1 Ohio, 513.

the appeal must thereupon be considered perfected ; the original papers pertaining to the cause may be used upon the trial, or hearing, in the court of common pleas.^a

Upon the decision of any cause, appealed to the court of common pleas, the clerk of said court must make an authenticated transcript of the order, judgment, and proceedings of said court therein, and must file the same with the probate judge, who must record the same, and the proceedings thereafter must be the same as if such order, judgment, and proceedings had been in the probate court.^b

A party (being entitled to do so)¹ desiring to appeal his cause to the *district court*, must, at the term in which the judgment or order is rendered enter on the records notice of such intention ; and within thirty days² after the rising of the court, give an undertaking with sufficient surety, to be approved by the clerk of the court, or a judge thereof, as hereinafter provided.^c

The rule about the appeal bond in such cases is the same as in appeal from the probate court on page 220.

In such cases the clerk, at the expiration of thirty days from the rising of the court, must, if not otherwise directed, make a transcript, which, together with the papers and pleadings filed in the cause, he shall transmit to the clerk of the district court, as in other cases of appeal.^d

When a party to a judgment has given notice as aforesaid, and dies within the time limited for the appeal, and before perfecting the same, the administrator or executor of such deceased

(1) An action by executors against devisees, distributees, and heirs, asking the direction and judgment of the court touching the construction of the testator's will, and the duties of the executors thereunder, and although praying, among other things, for an order to sell lands, in pursuance of the supposed intention of the testator, for the payment of legacies, is appealable from the common pleas to the district court. *Townsend's Ex'rs v. Townsend*, 24 Ohio St. 1. See also *Steinberger v. Steinberger*, 19 Ohio, 106, and note 1, p. 180.

(2) As to construction of when this time begins and expires, see *Steinberger v. Steinberger*, 19 Ohio, 106 ; *Morgan v. Stittigan*, 10 W. L. J. 74 ; *Harris v. Gest*, 4 Ohio St. 469 ; *Hoagland v. Schnorr*, 17 Ohio St. 30.

(a) § 6409.

(b) § 6410.

(c) § 5227.

(d) § 5228.

party, at any time within thirty days after his appointment and qualification, and within ninety days after the death of such party, may cause notice of his intention, as such administrator or executor, to appeal the cause, to be entered on the journal of the court; and such administrator or executor will thereby be made a party to the judgment, and the appeal must be considered as perfected.^a

SECTION II.

MECHANIC'S LIEN

When there is money due the decedent for labor done, or for materials or machinery furnished for constructing, altering, or repairing any building, bridge, or watercraft; or any street, turnpike, road, sidewalk, drain, ditch, or sewer, by virtue of a contract between the decedent and the owner¹ or owners² of the land

(1) The death of the owner, after the work has been done, does not interfere with the right of the mechanic to a lien. *Williams v. Webb*, 3 W. L. G. 81; 2 D. 430.

The word "owner" . . . is not limited in its meaning to the owner of the fee, but includes also an owner of a leasehold estate. If the ownership is in fee, the lien is upon the fee; if it is a less estate, the lien is upon such smaller estate. *Choteau et al. v. Thompson et al.*, 2 Ohio St. 114; *Dutro v. Wilson*, 4 Ohio St. 101.

An owner had given a lease for three years, the lessee to leave a building thereon at the expiration of his term. A mechanic's lien was taken for work and materials done on the building put up by the lessee, a judgment had against him on the lien, and on sale in execution the defendant purchased and removed the building. *Held*, as the lessee had no right to remove the building, the purchaser acquired no such right. *Dutro v. Wilson*, 4 Ohio St. 101.

(2) S. and F., married women, and owners in severalty of adjoining lots, the same being their separate property, did, together with their respective husbands, contract with E. for the erection of a house on the line of their lots, so as to furnish each a homestead on her own lot. E. having erected the house, verified an account of the items of labor and materials furnished under the contract, and had the same duly recorded, as required by law, and afterward prosecuted his action against all the contracting parties, to subject the property improved to the satisfaction of his claim. *Held*, 1.

(a) § 5229.

abutting on such road, sidewalk, drain, etc., or upon which such building stands,¹ it is the duty of the administrator or executor to take the necessary steps for obtaining a mechanic's lien upon such building and land. The method of effecting such a lien is briefly this: The executor or administrator should make out an account from the books of the decedent, or otherwise, specifying as near as may be the items² of work, materials, or machinery, and the value of the same, and all the credits and set-offs on the account, and should make oath before some person authorized to administer oaths generally, that such account is correct; that the amount claimed is justly due the estate of the decedent; that such work was performed, or such materials or machinery were furnished, in or for constructing, altering, or repairing the building, street, ditch, sewer, etc., upon which, together with the land it stands or abuts upon (which building, ditch, etc., and land must be described), it is desired to effect the lien (159). If this

That a lien attached to each of said lots and a portion of the house erected thereon, to secure such portion of the labor and materials as were expended thereon; 2. That in such action it was proper to take an account of the cost and expense of the whole improvement, and to apportion the same between the lots, according to the value of the labor and materials expended on each; 3. That, upon failure of payment, it was properly decreed that each of the lots be sold to satisfy the lien so found against it. *Edwards v. Edwards*, 24 Ohio St. 402.

(1) The words, in the law, "lot of land upon which the same may stand," do not mean merely the ground covered by the building, nor do they confine the lien to the particular lot, as known on the town plat. on which the building stands. Where two adjacent town lots are used, without any actual division between them, as one mill-lot or the like, a part of the building and machinery being upon one, and a part upon the other, the lien extends to both lots, although the precise spot where the work was done may be within the limits of one of them. The same rule applies to two or more adjacent lots thrown, for any common purpose, into one, the ideal lines of division being disregarded. *Choteau et al. v. Thompson et al.*, 2 Ohio St. 114.

(2) Where a mechanic undertakes and completes a building as an entire job, by the job, and for an entire price, he need not, in an account filed with the county recorder, in order to secure a mechanic's lien, make a detailed statement of his labor and materials. In such case the entire job may be set down as an entire item. *Davis v. Hines*, 6 Ohio St. 473; *Thomas v. Huesman*, 10 Ohio St. 152. See also note 2 on p. 224.

account be for work or materials on a street, turnpike, sidewalk, road, drain, sewer, etc., the account must include a statement of the amount and value of the labor, etc., an estimate per front foot of the value of such labor or materials along the line of the street, etc., and when a contract is made with several owners, a description of the lands, with the number of front feet abutting on the line of such owners as fail to pay (160). When the work was done or materials were furnished on a written contract, a copy of the same must be attached to and filed with the account; and if not in writing, a statement of the amounts and times of payments to be made thereunder, must be inserted in the account or affidavit. The account thus authenticated must be filed in the office of the county recorder within four months¹ from the time the last item of work was done or materials, etc., were furnished by the decedent. A lien thus taken for labor done upon, or materials, etc., furnished for, any *house, boat, or other building* will take effect upon such house, etc., and upon the interest the owner has upon the lot or land upon which it stands or shall be removed to, from the date² of the first item of said labor done or materials, etc., furnished, and will be in force

(1) Where the work is actually completed and settled for, a lien must be taken within four months. Minor details or insignificant finishing touches can not be made use of to extend the time for taking out a lien, nor can two distinct accounts be taken together. *Hazard Powder Co. v. Loomis et al.*, 2 D. 544, 554, 557.

(2) The lien dates from the commencement of the labor or of furnishing the materials, and there is, in this respect, no difference between laborers and material men. Where materials are furnished from time to time, for a particular purpose, and the dates are so near each other as to constitute one running account, the lien dates from the time the first article was supplied, although, strictly speaking, the articles were not furnished under one entire contract. But where they are furnished for different purposes, or where there are intervals of time in the account, so long that it can not with propriety be called one account, there is not, in the absence of an entire contract, a lien for the whole, from the date of the first article furnished. The items in such case will be regarded as forming one, two, or more distinct accounts. *Choteau et al. v. Thompson et al.*, 2 Ohio St. 114; *Williams v. Miller*, 1 W. L. M. 409.

It is not necessary, to constitute a continuous account, that there should have been a distinct contract at the beginning as to the amount of work to be done or the duration of it. It is sufficient that he begins under reasona-

for two years after the filing of said account, or until finally adjudicated, if an action thereon be commenced within the required two years.¹ A lien taken for labor done or materials furnished upon any *street, turnpike, road, sidewalk, ditch, drain, or sewer* will be good upon the interest the owner has on the lot or land abutting upon such turnpike, road, ditch, etc., from the date of the first item of labor done or materials furnished; but such lien will remain good for only *one* year from the time of filing the account, or until finally adjudicated, if an action thereon be commenced within the required one year.^a

If several liens be obtained as above provided, by several persons on the same job, such liens shall have no priority among themselves, but shall be paid *pro rata*.^b

If, in an action to enforce any lien, the property will not sell because of defective title, the court will cause the property to be rented or leased (subject to prior *bona fide* liens), and the lien to be paid out of the rents and profits. Such rents will be made payable to the court, through the officer holding the execution,

ble expectation that more will be required to finish the building, and continues to furnish on orders from time to time.

The mere recording of a mortgage will not cut out subsequent items. Whether actual notice by incumbrancers would do so is questioned. *Hazard Powder Co. v. Loomis et al.*, 2 D. 544, 552, 554.

(1) Where the holder of a mechanic's lien, within the two years within which lien remains operative, commences an action on his account to obtain a personal judgment for the amount thereof, such lien is, by the provisions of the law creating it, continued until the action is determined, and until the judgment obtained by the plaintiff is satisfied. The premises charged with such lien may be subjected to the satisfaction of the same as against a purchaser in good faith, who bought without actual notice of plaintiff's claim, pending the action thereon, and after the expiration of said period of two years. *Ambrose v. Woodmansee & Wolf*, 27 Ohio St. 147.

Mechanics' liens relate back to the commencement of the labor for which they exist, and from that time subsist against all persons with or without notice. *Williams v. Miller*, 1 W. L. M. 409.

(2) See note 2, p. 224.

(a) §§ 3184-3187.

(b) § 3188.

and the court will pay money so obtained to the lienholders entitled thereto.^a

If any lienholder, after the amount of his lien or judgment thereon, with legal costs, has been paid or tendered to him, shall nevertheless proceed to sell, lease, or rent said property, he shall forfeit said lien and pay the owner all damages arising to him therefrom, not exceeding the amount of said lien and his costs; and if said lienholder, after the amount of his lien has been satisfied or adjudged against him in any action thereon, shall neglect or refuse, on the written request of the owner, to file within ten days thereafter a certificate of said satisfaction or adjudication with the county recorder, and to be entered by him (the recorder) on the margin of the said lien, said lienholder shall pay said owner, in action by him, all damages arising therefrom, not exceeding the amount of said lien and costs. (166)^b

If the holder of a mechanic's lien proceeds, under the provisions of this section, against property whose owner resides without this state, or is beyond the reach of process, notice may be given by publication, as in other civil actions.^c

If any deceased sub-contractor or material man, laborer, or mechanic performed any labor or furnished any materials or machinery for the construction, alteration, removal, or repair of any property, appurtenance, or structure, as heretofore described, or for the construction or repair of any turnpike, road improvement, or other public improvement, provided for in a contract between the owner and any board or officers, and the head or principal contractor, and under a contract between such deceased sub-contractor, material man, laborer or mechanic, and the principal contractor or some sub-contractor, and whose demands therefor shall not be paid when due, then the executor or administrator of such decedent may file with the said owner,¹

(1) When a sub-contractor seeks a lien under the statute against a corporation as the owner, the delivery of his attested account against the contractor to the agent or officer of the corporation, who is duly authorized to enter into the contract under which the job is done in his own name, and to account to the contractor and sub-contractor, in accordance with their respective rights, is sufficient notice to fix the lien against the corporation.

The leaving of his attested account by a sub-contractor of a city school-

(a) § 3189.

(b) § 3190.

(c) § 3191.

board, or officer, or the authorized clerk or agent thereof, a sworn and itemized account (161) (162) of the amount and value of said labor or materials under the contract, express or implied, under which the labor was performed or material was furnished, with all credits and set-offs thereon.^a

Upon receiving the notice, the owner, board, or officer, or authorized clerk, agent, or attorney thereof, must detain in his hands all subsequent payments from the principal or sub-contractor upon the contract, as security for that and similar accounts so filed before the next payment under the contract, or within ten days thereafter.^b

A copy of this account (161) (162) must also be filed at the same time with the recorder of the county where the property is situate, otherwise the executor or administrator will have no preference over other claimants.^c

If a lien has been taken to secure a claim about which there is a dispute, the party taking such lien shall, within thirty days thereafter, notify (163) the owner of the property, or his agent or attorney, that such a lien is in existence, and if he fails to do so within the time prescribed, then the lien so taken shall be null and void.^d

The owner of property upon which a lien has been so taken, may notify in writing (164) the owner of the lien, or his agent or attorney, to commence suit thereon, and if he fails to commence the suit within sixty days after receiving such written notice, the lien shall be null and void; but nothing herein contained will prevent the claim from being collected as other claims are now collected by law.^e

When such copy is filed with the county recorder, any other sub-contractors, material men, laborers, or mechanics wishing to be paid out of said next payment or payments *pro rata* with the one who has filed such copy, must file with such owner, board, officer, or authorized clerk, agent, or attorney thereof, before the

house at the office of the clerk or the board of education, whether sufficient or not to create a claim against the city under the statute, was sufficient in this case, where the clerk had been previously authorized to make the contract and to settle with the sub-contractors. *Dunn v. Rankin*, 27 O. S. 132.

first of said subsequent payments falls due, or within ten days thereafter, a sworn account (161) (162)¹ or estimate of the labor, machinery, etc., furnished or to be furnished under their said contracts with the head contractor or sub-contractor; and if they fail to file such account or estimate, they will have no recourse against said owners, etc., for any prior payments made under his contracts with his head contractor or sub-contractor.^a

Upon the filing of an account as provided in the preceding paragraph, the owner, board, officer, or clerk, agent, or attorney thereof, must, within five days from the time of receiving it, furnish a copy thereof to the contractor or sub-contractor owning the account, who must, within five days from the time of the receipt of such copy, notify in writing (165) the owner, board, officer, or clerk, agent, or attorney thereof, of his intention to dispute such account, or must, within five days after giving such notice, begin the arbitration mentioned below, or commence an action to adjust said account, or he shall be considered as asserting to the account, and the owner must pay, *pro rata*, the same and other similar accounts properly presented to him, and assented to or adjusted, as above directed. But the claims of laborers, mechanics, or persons furnishing materials, shall be paid before the claims of sub-contractors, and of sub-contractors before those of head contractors.^b

If any head or sub-contractor dispute any account or estimate filed against him as above provided, and he and the claimant can not adjust it between themselves, each of them must choose a disinterested arbitrator, and these two shall select a third, and the decision of these, or of any two of these, arbitrators, will, in the absence of fraud or collusion, be final and conclusive.^c

If any head contractor or sub-contractor neglect or refuse to pay, within five days after his assent to an adjustment of said account, the amount thereof and costs incurred to the person entitled thereto, then the owner, board, officer, or clerk, or agent thereof, must pay, when due, the whole or *pro rata* amount thereof, as the case may be, as above provided, out of subsequent

(1) The forms already given for *labor done*, etc., can readily be changed into accounts and estimates of labor done *and to be done*, etc., or to estimates alone of labor *to be done*, by virtue of a verbal or written contract.

(a) § 3198.

(b) § 3199.

(c) § 3200.

payments, or within ten days thereafter ; and on his failure so to do, the person entitled thereto may recover against said owner, in an action for money had and received when due, the whole or *pro rata* amount, as may be, of his said account or estimate, not exceeding in any case the balance due to said head contractor.^a

If out of said subsequent payments, as they severally fall due under his contract, or within ten days thereafter, the owner shall fail to pay, when due, the whole or *pro rata* amounts, as may be, of such sworn accounts or estimates, the person entitled to the account may file with the recorder of the county where the property is situate, within forty days from the date of said subsequent payment, an account prepared in accordance with the directions in the first paragraph of this section, as though such account were the account of a head contractor ; and such lien shall date back from the first item of labor, etc., and have the same operation, duration, and effect, and be subject to the same obligations with respect to the owner, as the lien of a head contractor in similar cases.^b

Such lien shall take precedence over any lien already taken or to be taken by the head contractor, and the lien of any laborer, mechanic, or material man, shall take precedence over any present or future lien of any sub-contractor or contractor indebted to them ; and such precedence can not be changed by any transfer or assignment of any contract of the head contractor with the owner, nor by any proceedings in attachment' or otherwise against such head contractor.^c

If by collusion or fraud said owner, etc., pay in advance of the payments due on his contract, he shall be liable to said laborers and others for the same amount as if no such payment had been made ; but if such payment be made in good faith to complete the work agreed upon in the contract, and in accordance therewith, it shall not be held as fraudulent or collusive.^d

If the progress or completion of the work on any of the above mentioned property be suspended by the default or death of the owner, without consent of the head or sub-contractors or

(a) § 3201.

(b) § 3202.

(c) § 3203.

(d) § 3204.

material men, any or all of them may complete the work in accordance with the original contract, and then have all the remedies above mentioned.^a

There is no homestead or other exemptions against any of the liens above mentioned.^b

The executors and administrators of deceased owners not only have the same rights that the owners had, but are subject to the same liabilities as were the owners under the provisions of the law relating to mechanics' liens, as above set forth.^{c 1}

In order to entitle a material man to obtain a lien on any building or land, the materials must be furnished under a contract (written, verbal, or implied) that they are to be put to the particular use of erecting, altering, or repairing a particular building, or other definitely understood job. The contract intended by the statute is one that has reference to the *purpose* for which the work is done or the materials furnished. If such materials are furnished to a contractor to be used wherever he may choose, as for instance, iron to a stair-builder, the builder not designating to what job he will apply that lot of iron, no lien can then be taken. But if materials are furnished under such a contract with the owner, to be applied for such a definite job, the material man may take a lien for them on that specified or agreed house, etc., even if the contractor should otherwise appropriate a portion of them without the consent of the party furnishing them.²

A mechanics' lien can not be created upon the real estate of a married woman for work done or materials furnished in erecting a house thereon under a contract with her husband.³ But if she

(1) Horton's Adm'r v. Carlisle, 2 D. 184.

(2) Choteau et al. v. Thompson et al., 2 Ohio St. 114; Horton's Adm'r v. Carlisle, 2 D. 184; Beckel v. Petticrew, 6 Ohio St. 247; Hazard Powder Co. v. Loomis et al., 2 D. 544, 559; Stephens v. United R. R. Stock Yd. Co., 29 Ohio St. 227. Dunn & Witt v. Rankin & Co., 27 Ohio St. 132. See also note 2, p. 224.

(3) Spinning v. Blackburn, 13 Ohio St. 131.

(a) § 3203.

(c) § 3192.

(b) § 3185.

should stand by and see work done or materials furnished under such circumstances, without protesting against it, it has been held that a mechanic's lien could then be enforced against her.¹ And she can, by her own contract, charge her separate estate, at least to the extent of the rents and profits thereof, with the cost of reasonable repairs and improvements for the benefit of the estate, and to that extent a mechanic's lien may attach under the statute.²

Any person holding a mechanic's lien may, in addition to the remedies already mentioned, proceed by petition, as in other cases of liens, against the owner and all other persons interested, either as lienholders or otherwise, in any such boat, vessel, or other watercraft, or house, mill, manufactory, or other building or appurtenance, and the lot of land on which the same may stand or to which it may be removed, and obtain such judgment therein for the rent or sale thereof as justice and equity may require.^a

(1) *Decamp v. Gaskill*, 1 C. S. C. R. 337.

(2) *Machir v. Burroughs*, 14 Ohio St. 519. See also note 2, p. 222.

(a) § 3206. See also 78 O. L. 78, and 80 O. L. 183.

FORMS.

1.

Declination of executor.

(Page 45.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

The undersigned hereby declines the appointment of executor of the last will and testament of A. B., deceased.

—, 18—.

C— D—.

—O—

2.

Citation requiring person named executor to appear and accept or decline letters.

(Page 45.)

The State of Ohio, — county, ss.

To C. D., greeting:

Whereas, A. B., by his last will and testament, duly admitted to probate by the probate court of said county, has named you executor thereof, these are therefore to require you to appear in said court, on or before the — day of —, 18—, at — o'clock — m., and make known your intention to accept or decline said trust.

Witness my signature and the seal of said court at —, this
[L. s.] — day of —, 18—.

M— N—,

Probate judge.

—O—

3.

(Two forms.)

Declination of widow and heirs.

(Pages 48, 60, 61.)

To the Hon. the Judge of the Probate Court within and for the county
of —, and State of Ohio: *

I hereby decline administering upon the estate of my late husband,
A. B., deceased.

— —, 18—.

Y—— B——,
Widow.

Preceding form to the *.

The undersigned, heirs at law [or, widow and heirs at law] of A. B.,
late of said county, deceased, hereby decline the administration of
his estate, and recommend the appointment of C. D. as administrator
thereof.

— —, 18—.

Y—— B——,
Widow.

W—— B——,
U—— B——.

—o—

4.

Notice to appear and accept or decline administration.

(Page 48.)

To Y. B., widow [or, W. B. and U. B., heirs at law; or, Y. B., widow,
and W. B. and U. B., heirs at law] of A. B., deceased:

You are hereby notified to appear before the probate court within
and for the county of —, and State of Ohio, on or before the —
day of —, 18—, at — o'clock, — m., and make known your intention
to accept or decline the administration of the estate of said deceased,
or a motion will then and there be made to commit the administration
to some other suitable person.

— —, 18—.

O—— P——.

—o—

5.

Citation to appear and accept or decline administration.

(Page 48.)

The State of Ohio, — county, ss.

To Y. B., widow [or, W. B. and U. B., heirs at law; or, Y. B., widow, and W. B. and U. B., heirs at law] of A. B., deceased:

You are hereby required to appear in the probate court within and for said county of —, on or before the — day of —, 18—, at — o'clock, — M., and make known your intention to accept or decline the administration of the estate of said deceased, or the administration will then and there be committed to some other suitable person.

Witness my signature and the seal of said probate court, at [L. s.] —, this — day of —, A. D. 18—.

M—— N——,

Probate judge.

—o—

6.

(Two forms.)

Application for letters of administration or letters testamentary.

(Pages 44, 59, 61.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio: *

I ask to be appointed administrator [or, administrator *de bonis non*] of the estate of A. B., late of said county, deceased.

Estimated value of personal estate..... \$1,000 00

I offer a bond in..... 2,000 00

with E. F. and G. H., sureties.

And I ask for the appointment of I. J., K. L., and M. N., as appraisers of personal estate.

— —, 18—.

C—— C——.

In applications for letters testamentary or letters of administration with the will annexed, follow the preceding form to the *, and add:

I ask for letters testamentary [or, letters of administration with the will annexed] upon the estate of A. B., late of said county, deceased.

Estimated value of personal estate subject to administration \$1,000 00

Estimated value of real estate directed by the will

of the decedent to be sold..... 3,000 00

I offer a bond in..... 8,000 00

with E. F. and G. H. sureties.

And conclude as in the preceding form.

—O—

7.

(Several forms.)

Journal entry of letters testamentary, letters of administration, etc.

(Pages 47, 48, 49, 59.)

Letters testamentary upon the estate of A. B., deceased, are granted to C. D., the executor named in the will of said decedent; and he is ordered to give bond in \$8,000.00, conditioned according to law. E. F. and G. H. are accepted as sureties.

I——	J——,	} are appointed appraisers of goods.
K——	L——,	
M——	N——,	

Another.

C. D., the executor named in the last will and testament of A. B., deceased, having declined accepting said trust, on motion, letters of administration, with the will annexed, upon the estate of said deceased, are granted unto O. P.; and he is ordered—*conclude as in preceding form.*

Another.

On motion, C. D. is appointed administrator [*or, administrator de bonis non*] of the estate of A. B., deceased; and he is ordered—*conclude as in preceding form.*

Another.

On motion, letters of administration upon the estate of A. B., deceased, are granted unto C. D.; and he is ordered—*conclude as in preceding form.*

Another.

The widow [*or, the heirs at law; or, widow and heirs at law*] of A. B., deceased, declining to administer upon the estate of her late husband [*or, declining to administer upon the estate of said decedent*], on mo

tion, O P. is appointed administrator of said estate; and he is ordered—*conclude as in preceding form.*

—O—

8.

Bond of an executor, or an administrator with the will annexed.

(Pages 45, 55, 56. 61.)

Know all men by these presents, that we, C. D., E. F., and G. H., are held and firmly bound unto the State of Ohio in the penal sum of eight thousand dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators, if default be made in the condition following:

Whereas, letters testamentary [*or*, letters of administration with the will annexed] upon the estate of A. B., deceased, were granted to the said C. D., by the probate court of — county, in the State of Ohio, on the — day of —, A. D. 18—; now if the said C. D., as executor of the last will and testament [*or*, as administrator with the will annexed of the estate] of the said A. B., deceased, shall,

First. Make and return to said court, on oath, within three months, a true inventory of all the moneys, goods, chattels, rights, and credits of said testator that are by law to be administered, and which shall come to his possession or knowledge; and also, if required by said court, an inventory of the real estate of said deceased;

Second. Shall administer according to law, and the will of said testator, all his goods, chattels, rights, and credits, and proceeds of all his real estate that may be sold for the payment of his debts and legacies, which shall at any time come to the possession of said executor [*or*, administrator with the will annexed], or to the possession of any other person for him; and,

Third. Shall render, upon oath, a just and true account of his administration, within eighteen months, and at any other times when required by said court or by the law, and failing so to do for thirty days after he shall have been notified of the expiration of the time by the probate judge, he shall receive no allowance for services, unless the court shall enter upon its journal that such delay was necessary and reasonable; then this obligation to be void: otherwise to be and remain in full force and virtue in law.

Signed and sealed by us this — day of —, A. D., 18—.

Executed in presence of

C—— D——, [L. s.]

E—— F——, [L. s.]

G—— H——, [L. s.]

9.

Bond of an administrator, or an administrator de bonis non.

(Pages 48, 50, 55, 56, 61.)

Know all men by these presents, that we, C. D., E. F., and G. H., are held and firmly bound unto the State of Ohio, in the penal sum of two thousand dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators, if default be made in the condition following:

Whereas, letters of administration [*or, letters of administration de bonis non*] upon the estate of A. B., deceased, were granted to the said C. D., by the probate court of — county, in the State of Ohio, on the — day of —, A. D. 18—; now if the said C. D., as administrator [*or, administrator de bonis non*] of the estate of said A. B., deceased, shall,

First. Make and return into said court, on oath, within three months, a true inventory of all the moneys, goods, chattels, rights and credits of the deceased which have or shall come to his possession or knowledge; and also, if required by said court, an inventory of the real estate of said deceased;

Second. Shall administer according to law, all the said moneys, goods, chattels, rights and credits of said deceased, and the proceeds of all his real estate that may be sold for the payment of his debts, which shall at any time come to the possession of said administrator, or to the possession of any third person for him;

Third. Shall render, upon oath, a true account of his administration, within eighteen months, and at any other times when required by said court or the law; and failing so to do for thirty days after he shall have been notified of the expiration of the time by the probate judge, he shall receive no allowance for his services, unless the court shall enter upon its journal that such delay was necessary and reasonable;

Fourth. Shall pay any balance remaining in his hands upon the settlement of his accounts, to such persons as said court or the law shall direct; and,

Fifth. Shall deliver the letters of administration into court, in case any will of said deceased shall be hereafter duly proved and allowed; then this obligation to be void: otherwise to be and remain in full force and effect.

Signed and sealed by us this — day of —, A. D. 18—.

Executed in presence of

C — D —, [L. S.]

E — F —, [L. S.]

G — H —, [L. S.]

10.

Letters testamentary or letters of administration.

(Pages 45, 49.)

The State of Ohio, — county, ss.

To all to whom these presents shall come, greeting:

Know ye that the probate court of said county doth hereby grant letters testamentary [*or, of administration; or, of administration with the will annexed; or, of administration de bonis non*] upon the estate of A. B., deceased, unto C. D., to whom is committed the administration of all and singular the goods, chattels, moneys, rights, and credits of said deceased; and also the proceeds of all the real estate of said deceased which he may be authorized to sell; and whose duty it shall be to adjust and settle up the estate of said deceased, in all respects agreeably to law.

And be it further known, that we have appointed I. J., K. L., and M. N., appraisers of the personal estate of said deceased.

In testimony whereof I hereto affix my signature and the seal of said [L. s.] probate court, at —, this — day of —, A. D. 18—.

————, *Probate judge.*

—O—

11.

Notice of appointment by executor or administrator.

(Pages 62, 123.)

NOTICE.

The undersigned has been duly appointed executor of the last will and testament [*or, administrator; or, administrator de bonis non* of the estate] of A. B., late of — county, Ohio, deceased.*

— day of —, 18—.

C— D—.

This form of notice will be sufficient, but if desired, the following may be added, commencing at the *.

All persons indebted to the estate are requested to make immediate payment; and those having claims against the same will present them, duly authenticated, to the undersigned, for allowance.

—O—

12.

Notice to widow, heirs, and legatees of the time of making the appraisalment.

(Page 64.)

To Y. B., widow [or, W. B., heir at law; or, legatee] of A. B. deceased:

You are hereby notified that an inventory and appraisalment of the personal estate of said decedent will take place at his late residence, on the — day of —, 18—, commencing at — o'clock, — M.

— — 18—.

C — — D — —,

Administrator.

— O —

13.

Notice of the time of making the appraisalment to be posted up:

(Page 64.)

NOTICE.

An inventory and appraisalment of the personal estate of A. B., deceased, will take place at his late residence in —, on the — day of —, 18—, commencing at — o'clock, — M.

— — 18—.

C — — D — —,

Administrator of said estate.

— O —

14.

Appointment of appraiser by justice of the peace, and order to appointee.

(Pages 64, 143.)

To —, of — county:

You are hereby appointed to appraise, on oath, the estate and effects of —, late of — county, deceased. Deliver this order to the administrator or executor of said deceased.

Given under my hand this — day of —, A. D. 18—.

(Form prescribed by statute.)

— — — —,

Justice of the peace.

— O —

15.

Oath of appraisers.

(Page 64.)

The State of Ohio, — county, ss.

I. J., K. L., and M. N., appraisers of the personal estate of A. B., deceased, being sworn, say that they will truly, honestly, and impartially appraise the estate and property of said decedent which may be exhibited to them, and perform the other duties required of them by law in the premises, as appraisers, according to the best of their knowledge and ability.

Sworn to and subscribed before me, this — day of —, A. D. 18—.

I — J —,

K — L —,

M — N —.

T — U —, *Justice of the Peace.*

(Or other authorized officer.)

— o —

16.

Inventory; including schedules of property exempt from appraisement, widow's allowance, and property belonging to the widow in her own right.

(Pages 51, 63, 65, 66, 67, 68, 70, 77.)

First insert the oath of the appraisers. Form No. 15.

Inventory and appraisement of the personal estate of A. B., deceased, made on the — day of —, A. D. 18—, by I. J., K. L., and M. N., appraisers of said estate.

In compliance with the statute, the undersigned appraisers set off to the widow [*or, to the widow and minor children; or, to the minor children*] of said A. B., deceased, the following articles without appraisement; the same being exempt from administration.

For a list of the articles so exempt, see Chapter III., Section III.

— —, 18—.

I — J —,

K — L —,

M — N —,

Appraisers.

And we do also set off and allow to Y. B., the widow of said dece-

dent, and to O. B. and C. B., his children, under the age of fifteen years [*or either, as the case may be*], the following property for their support for twelve months from the time of his death:

Provisions and other property already consumed by them.....	\$10 00
300 lbs. pork.....	15 00
All the flour on hand.....	12 00
10½ bu. potatoes.....	6 62
20 lbs. lard.....	2 00
2 hogs.....	12 00
20 chickens.....	2 00
3 turkeys.....	1 50

And there not being sufficient property of a suitable kind to set off, we certify that they will need in money the additional sum of300 00

\$357 12

— —, 18—.

I — J —,

K — L —,

M — N —,

Appraisers.

The following articles of furniture and household goods we find that Y. B., the widow of said decedent, brought with her at the time of her marriage, or came to her by bequest or gift, or were purchased with her separate money, afterward:

1 bureau,

1 sofa,

1 set chairs,

— —, 18—.

1 center table,

A lot of mantel ornaments,

1 looking-glass.

I — J —,

K — L —,

M — N —,

Appraisers.

And we do appraise the residue of the personal estate of said A. B., deceased, as follows:

1 black horse.....	\$110 00
1 bay colt.....	40 00
2 hogs, at \$5.....	10 00
1 spotted cow....	22 00
1 white cow.....	23 00
1 set harness.....	15 00
1 buggy.....	60 00
1 farm wagon.....	45 00

110 bu. wheat, at \$1.00.....	110 00
40 bu. corn, at 50c.	20 00
	Etc., etc.

Money on hand at death of decedent:

Bank bills.....	\$40 00
Specie.....	10 00

Should there be no money, say, No money of any kind.

The following claims in favor of the estate are considered collectable:

Promissory note for \$100.00 against P. X., dated — —, 18—, due — —, 18—, with interest from date. Secured by mortgage.

Due bill for \$70.00 against Q. Z., dated — —, 18—: paid thereon \$40.00, — —, 18—. Balance due, \$30.00 and interest.

Judgment for \$15.20 against Y. V., upon the docket of O. P., justice of the peace of — township, — county, Ohio, dated — —, 18—.

Book account against L. C., \$7.15. Last item dated — —, 18—.

Book account against G. S. Balance due — —, 18—, \$2.55.

This method of entering claims in the inventory is adopted in preference to any other, because it is more simple, and will make the labor of recording the inventory less difficult.

The following claims are considered doubtful:

Enter here doubtful claims in manner preceding.

The following claims are considered uncollectable:

Enter here claims supposed, for any reason, to be uncollectable.

Given under our hands, this — day of —, A. D. 18—.

I — J —,
K — L —,
M — N —,

Appraisers.

—O—

Affidavit of executor or administrator to inventory.

(Page 75.)

The State of Ohio, — county, ss.

C. D., executor of the last will and testament [or, administrator of the estate] of A. B., deceased, being sworn, says that the foregoing inventory is in all respects just and true; that it contains a correct statement of all the estate and property of said deceased, being assets, that have come to his knowledge;* and particularly of all moneys,

19.

Writ of citation or summons, requiring executor or administrator to file an inventory, sale bill, or account.

(Pages 52, 76, 85.)

The State of Ohio, — county, ss.

To C. D., administrator of the estate [or, executor of the last will and testament] of A. B., deceased:

You are hereby required, on or before the — day of —, A. D. 18—, to file an inventory [or, sale bill; or, account of your administration] of said estate, in the probate court of said county, according to law, or then and there to appear and show cause why an attachment should not issue against you for your default.

Witness my signature and the seal of said probate court, at
[L. s.] —, this — day of — A. D. 18—.

W— B—,

Probate judge.

—O—

20.

Journal entry of order of attachment.

(Pages 52, 76, 85.)

The State of Ohio, on application of, etc.,	}	Citation.
vs.		
C. D. administrator of the estate of A. B., deceased.		

The writ of citation having been returned served, and said defendant having failed to file an inventory [or, sale bill; or, account of his administration] of the estate of said A. B., deceased, within the time limited in that behalf, or to show cause why an attachment should not issue against him for his default: It is ordered that a writ of attachment issue to the sheriff of — county, to bring the body of said C. D. into this court forthwith, to abide such order as the court may make concerning him in this behalf.

—O—

21.

Writ of attachment against executor or administrator.

(Pages 52, 76, 85.)

The State of Ohio, — county, ss.

To the sheriff of said county, greeting:

Whereas, C. D., administrator of the estate [or, executor of the last will and testament] of A. B., deceased, was, by the order of the probate court of said county, required to file an inventory [or, sale bill; or, account of his administration] of said estate, on or before the — day of —, A. D. 18—, or to show cause why an attachment should not issue against him for his default; and the said C. D., having failed to comply with the order aforesaid, you are therefore commanded to take the said C. D., and have his body forthwith before said court, to abide such order as may be made concerning him in this behalf. Hereof fail not; and bring this writ with you.

Witness my signature, and the seal of said probate court, at
[L. S.] —, this — day of —, A. D. 18—.

W— B—,

Probate judge.

— O —

22.

Revocation of the letters of an executor or administrator.

(Pages 53, 56, 57, 76, 85.)

C. D., administrator of the estate [or, executor of the last will and testament] of A. B., deceased, having failed to file an inventory [or, sale bill; or, account of his administration] of said estate, according to law [or, to give an additional administration bond; or, to execute a bond of indemnity to his sureties], although specially required to do so by this court, his letters of administration [or, testamentary] are hereby revoked and annulled, and he is divested of all power, authority, and control over the estate of said deceased. (See also Form No. 40.)

— O —

23.

Resignation of executor or administrator, and the journal entry of same.

(Page 54.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio :

The undersigned, executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased, hereby tenders his resignation of said trust, and prays that the same may be accepted.

C—— D——.

JOURNAL ENTRY.

C. D., executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased, having tendered his resignation of said trust, the same is, for good cause shown, accepted.

—o—

24.

Application for the appointment of a special administrator.

(Page 51.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio :

The undersigned respectfully represents that proceedings have been instituted to contest the validity of the last will and testament of A. B., deceased ; and that the condition of the personal estate of said decedent is such as to require the appointment of a temporary administrator to collect and take charge of the same until the termination of the proceedings aforesaid.

The undersigned asks to be appointed such special administrator.

The estimated value of the personal estate afore-

said is..... \$1,500 00

He offers a bond in..... 3,000 00

with E. F. and G. H. as sureties; and asks the appointment of I. J., K. L., and M. N. as appraisers of goods.

— —, 18—.

C—— D——.

—o—

25.

Appointment of special administrator.

(Page 51.)

It appearing that proceedings have been instituted to contest the validity of the last will and testament of A. B., deceased, and that the condition of the personal estate of said decedent is such as to require immediate attention, on motion, C. D. is appointed special administrator to collect and preserve the effects of said decedent; and he is ordered to give bond in \$3,000.00, conditioned according to law. E. F. and G. H. are accepted as sureties.

I—	J—	},	are appointed appraisers of personal estate.
K—	L—		
M—	N—		

—o—

26.

Bond of special administrator.

(Page 51.)

Know all men by these presents, that we, C. D., E. F., and G. H. are held and firmly bound unto the State of Ohio, in the sum of three thousand dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators, if default be made in the condition following:

Whereas, the probate court of — county, in the State of Ohio, on the — day of —, A. D. 18—, appointed the said C. D. special administrator to collect and preserve the effects of A. B., deceased; now if the said C. D., as special administrator as aforesaid, shall make and return into said court, within three months, a true inventory of all the moneys, goods, chattels, rights, and credits of the deceased, which have or shall come to his possession or knowledge, and shall truly account, on oath, for all the moneys, goods, chattels, debts, and effects of the deceased that shall be received by him as such special administrator, whenever required by said court, and shall deliver the same to the person who may be appointed executor or administrator of said decedent, or to such other person as may be lawfully authorized to receive the same, then this obligation to be void; otherwise, to be and remain in full force and effect.

Signed and sealed by us, this — day of —, A. D. 18—.

Executed in presence of

C— D—, [L. s.]

E— F—, [L. s.]

G— H—, [L. s.]

27.

Complaint against person suspected of concealing, embezzling, or carrying away assets.

(Page 78.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

The undersigned, administrator [*or, executor; or, widow; or, one of the heirs at law; or, one of the legatees; or, one of the creditors*] of A. B., deceased, respectfully represents that he has good reason to suspect, and does verily believe, that O. O., of said county, has concealed, embezzled, or carried away moneys, goods, chattels, things in action, and effects of said deceased, in fraud of the rights of the undersigned and others interested in the estate of said deceased:

Wherefore he asks that a writ of citation may issue against the said O. O., and that he may be compelled to answer, under oath, touching the matter of this complaint, and that such other proceedings may be had in the premises as are authorized by law.

C — D —,

Administrator of the estate of A. B., deceased.

28.

Citation of person suspected of concealing, etc., assets.

(Page 78.)

The State of Ohio, — county, ss.

To the sheriff of said county, greeting:

Whereas, complaint has been made to the probate court of said county against O. O., charging him with having concealed, embezzled, or conveyed away certain assets of the estate of A. B., deceased; these are therefore to require you to summon the said O. O. to appear before said court forthwith, to be examined on oath or affirmation touching the matter of said complaint. Hereof fail not, but of this writ make legal service and due return.

Witness my signature and the seal of said probate court, at
[L. s.] —, this — day of —, A. D. 18—.

W — B —,

Probate judge.

29.

Order as to refractory party.

(Page 78.)

The State of Ohio, on complaint of, etc.	} Citation for concealing, etc., assets.
<div style="text-align: center;"> <i>vs.</i> O ——— O ———. </div>	

The said defendant refusing to submit to an examination under oath touching the matter of the complaint in this case, although duly cited for that purpose [*or*, refusing to answer the following interrogatory, "———"?] propounded to him upon his examination in this case]: It is ordered that he be imprisoned in the cell of the jail of ——— county, and kept in close custody till he submit to such examination [*or*, until he answer said interrogatory].

—O—

30.

Heading for the examination of persons suspected of concealing, etc., assets.

(Page 78.)

The State of Ohio, ——— county, *ss.*

PROBATE COURT.

The State of Ohio, on complaint of	} Citation for concealing, embezzling, or conveying away assets of the estate of A. B., deceased.
C. D., administrator, etc.,	
<div style="text-align: center;"> <i>vs.</i> O ——— O ———. </div>	

The said O. O. being by me first duly sworn to make true answers to such questions as may be legally propounded to him touching the matter of the complaint in the case, deposes and says

Question: ———?

Answer: ———

—O—

should be required for the payment of the debts of said decedent, then this obligation to be void: otherwise to be and remain in full force and effect.

Signed and sealed by us this — day of —, A. D. 18—.

Executed in presence of

T—— U——, [L. S.]

V—— W——, [L. S.]

Y—— Z——, [L. S.]

—O—

33.

Order of probate judge, requiring executor or administrator to make inventory or sale, when exempt by will from doing so.

(Pages 63, 82.)

Upon application of R. B., one of the heirs at law [or, widow; or, creditor] of A. B., deceased, and for good cause shown, it is ordered that C. D., executor of the last will and testament of said decedent, make and return into this court an inventory [or, sale bill; or, inventory and sale bill] of said estate, according to law.

—O—

34.

Application for preceding order by party interested.

(Pages 63, 82.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

The undersigned, one of the heirs at law [or, creditors; or, the widow] of A. B., deceased, respectfully represents, that by the last will and testament of said decedent, all his personal estate is devised unto L. G. for life, and it is provided that no inventory or sale of said personal estate shall be made by the executor of said will.

Further represents that debts of said decedent have been presented to and allowed by said executor, amounting to a large sum, and that no provision is made by said will for the payment of the same. [*The foregoing may be altered to correspond to the facts.*]

The undersigned therefore prays the court for an order requiring C. D., the executor of said will, to make and return into court an inventory and sale bill of said estate, according to the terms of the statute in such case made and provided.

R—— B——.

35.

Notice of sale of personal property.

(Page 83.)

PUBLIC SALE.

The undersigned will offer for sale, at public auction, at the late residence of A. B., deceased, on —, the — day of —, 18—, the goods and chattels of said deceased, consisting in part of: [*Here insert a list of the leading articles.*]

Sale to commence at 10 o'clock, forenoon. Terms: Purchases amounting to three dollars or less to be paid in cash; above that sum, notes at nine [*or, six*] months, with two good sureties, will be taken.

— —, 18—.

C — D —,

Administrator [or, Executor].

— — — — —

36.

Sale bill.

(Page 83.)

Sale bill of the goods and chattels belonging to the estate of A. B., deceased, sold at public auction by C. D., executor of the last will and testament of said decedent [*or, administrator of said estate*], on the — day of —, A. D. 18—:

PROPERTY SOLD.	PURCHASERS' NAMES.	PRICE.
20 bushels potatoes—	L. K., 5 bu. at 40, Widow at appraisement, 5 at 30, Decayed before time of sale, 10 bu.	\$2 00 1 50
70 bushels oats—	C. H., 50 bu. at 20, Fed to stock before sale, 20 bu.	10 00
5 hogs—	G. T., one hog, first choice, C. S., one " second " L. K., one " third "	6 00 5 00 3 50
	One died before sale. One not sold for want of bidders.	
Property not inventoried: 1 cow—	R. R.	22 00
		\$50 00

The foregoing sale bill is correct.

— — —, 18—.

Z — — T — —,

Clerk of sale.

— — — O — — —

37.

Affidavit of executor or administrator to sale bill.

(Page 85.)

The State of Ohio, — — — county, ss.

C. D., executor of the last will and testament [*or, administrator*] of the estate of A. B., deceased, being sworn [*or, affirmed*], says that the foregoing sale bill of the goods and chattels of said decedent is, in all respects, correct, according to the best of his knowledge and belief.

C — — — D — — —.

Sworn [*or, affirmed*] to and subscribed by said C. D., before me, this — — — day of — — —, A. D. 18—.

W — — — B — — —,

Probate judge.

— — — O — — —

38.

Sale note.

(Page 81.)

\$22.00. Nine [*or, six*] months after date, we, or either of us, promise to pay C. D., as executor [*or, administrator*] of A. B., deceased, or bearer, twenty-two dollars, for property purchased at the sale of the personal estate of said deceased.

— — —, 18—.

P — — — R — — —,

L — — — T — — —,

G — — — H — — —.

— — — O — — —

39.

Entries in blank book.

(Page 86.)

THE ESTATE OF A. B., DECEASED, IN ACCOUNT WITH C. D., EXECUTOR [or,
ADMINISTRATOR].

[This heading should extend across two pages—one to be used for payments, the other for receipts.]

Dr. (Left hand page.)

June 1, 18—.	Paid probate judge's fees.	Voucher No. 1.	\$3 00
" 20, "	" I. J., appraiser.	" 2.	1 00
" 30, "	" C. L., auctioneer.	" 3.	2 00
" " "	" Z. T., clerk of sale.	" 4.	2 00
Aug. 8, "	" Y. B., widow's allowance.	" 5.	300 00
June 5, "	" L. S., book acc't.	" 6.	2 75
" 8, "	" G. P., note.	" 7.	10 70
	Etc.,	Etc.	

Cr. (Right hand page.)

Money on hand at death of decedent.....	\$40 00
Amount of sale bill.....	50 00
Received of Q. R., on book account.....	6 00
Etc.,	Etc.

—O—

40

*Revocation of letters of administration on the finding and allowing
of a will.*

- (Page 54.)

Letters of administration upon the estate of A. B., deceased, having been heretofore granted to C. D., under the belief that no last will and testament of said A. B. was in existence, and such a will having since been found, duly proved and allowed, the said letters of administration heretofore granted to said C. D., are hereby revoked and annulled, and he is divested of all power, authority, and control over the estate of such deceased.

—O—

41.

Note in favor of an estate, taken by executor or administrator.

(Page 91.)

\$50.00. — after date I promise to pay C. D., administrator of the estate of A. B., or to his successor in the administration, or bearer, fifty dollars, for value received.

— —, 18.

X—— Y——.

—O—

42.

Petition for order to sell desperate claims.

(Page 98.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

The undersigned, administrator of the estate [or, executor of the last will and testament] of A. B., deceased, respectfully represents that the following claims in favor of said estate, which accrued in the lifetime of the decedent, are desperate for the reasons hereinafter mentioned: [*Here give a description of the claims, with the reasons why they are desperate.*]

He therefore asks for an order authorizing him to make sale of said claims, or otherwise to dispose of them, according to law.

C—— D——,

Administrator [or, executor] of A. B., deceased.

The court may, if it deem best, require an affidavit, similar to the one appended to Form 66, to be added to this petition.

—O—

43.

Notice of filing the preceding petition.

(Page 98.)

NOTICE

Is hereby given that the undersigned has this day filed in the probate court of — county, Ohio, his petition, praying for an order authorizing him to sell, or otherwise dispose of, the following claims belonging to the estate of A. B., deceased, which accrued in the lifetime of said decedent, and which have become desperate, to wit: [*Here, if the*

claims are not numerous, insert the name of each debtor, the nature of the claim, and the amount due thereon. If numerous, one or more of the principal ones may be described in detail, and the rest briefly, as by stating the number of them, etc.]

Said petition will be for hearing on the — day of —, A. D. 18—. [At least three weeks from the time of filing the petition.]

—, 18—.

C— D—,

Administrator [or, executor] of said A. B., deceased.

—O—

44.

Journal entry of order to sell desperate claims.

(Pages 98, 99.)

C. D., the administrator of the estate [or, executor of the last will and testament] of A. B., deceased, having filed his petition, praying for an order authorizing him to sell, or otherwise dispose of, according to law, certain claims belonging to the estate of said decedent, which accrued in his lifetime, and which have become desperate in the hands of said administrator [or, executor]; and it appearing that notice of the time of hearing of said petition has been given according to law, and that the statements of said petition are true, it is ordered that said administrator [or, executor] proceed to advertise and sell [or, to compound for a sum not less than — per cent. of their nominal value; or, to file in court for the benefit of the heirs, devisees, or creditors of said A. B.; or, otherwise, as may be] the claims mentioned in said petition, according to the statute in such case made and provided.

—O—

45.

Notice of sale of desperate claims.

(Page 99.)

NOTICE.

The undersigned will sell at public auction, at —, on — day of —, A. D. 18—, the following claims belonging to the estate of A. B., deceased, viz: [*Here insert a list of the claims.*]

Sale to commence at — o'clock, — m. Terms cash.

—, 18—.

C— D—,

Administrator of A. B., deceased.

46.

Return of sale of desperate claims.

(Page 99.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

In compliance with the order of the court, I gave notice of sale by advertisement in the —, a weekly newspaper of general circulation in said county, for at least three consecutive weeks prior to the — day of —, 18—; and on that day, at — o'clock, — M., at —, I offered the desperate claims belonging to the estate of A. B., deceased, for sale, at public auction, with the following result:

Name of Debtor.	Nature of claim.	Amount due.	To whom sold.	Amount sold for.
I. L.	Note.	\$17 00	G. R.	\$1 00
K. G.	Book Acc't.	6 00		No bidders.

—, 18—.

C— D—,

Administrator of the estate of A. B., deceased.

—O—

47.

Motion and affidavit to obtain extension of time to collect assets.

(Page 99.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

The undersigned, administrator of the estate [or, executor of the last will and testament] of A. B., deceased, asks that one year further time be allowed him to collect the assets of said estate.

C— D—.

The State of Ohio, — county, ss.

C. D., being sworn, says, that the reason why the foregoing application is made is because the following claims in favor of the estate of said A. B., deceased, are not yet due [or, because suits have been commenced upon the following claims in favor of said estate, which are still pending], viz.: [*Here mention the claims.*]

He further says that the amount of money in his hands as such ad-

ministrator [*or, executor*], applicable to the payment of the debts of said decedent, is — dollars; and that he has used due diligence to collect the assets of said estate within the time limited by law.

C—— D——.

Sworn to and subscribed by said C. D., before me, this — day of —, A. D. 18—.

W—— B——,
Probate judge.

—O—

48.

Allowance of time by probate judge.

(Page 100.)

On motion and affidavit filed, and for good cause shown, C. D., administrator of the estate [*or, executor of the last will and testament*] of A. B., deceased, is allowed one year [*or, six months, or other period*] further time to collect the assets of said estate.

—O—

49.

(Two forms.)

*Authentication [*or proof*] of claim.*

(Page 107.)

The State of Ohio, — county, ss.

L. X., being sworn, says that the amount of the above claim is justly due him; that no payments have been made thereon, and that no set-offs exist against the same, except as above noted, according to the best of his knowledge.

L—— X——.

Sworn to and subscribed by L. X., before me, this — day of —, A. D. 18—.

Q—— G——,

Justice of the peace.

Should the claim be a note or due bill, the foregoing form may be altered so as to read:

The amount of the note [*or, due bill*] hereto attached is justly due him; that no payments have been made thereon, and that no set-offs exist against the same, according to the best of his knowledge.

50.

Agreement to refer claim to arbitration.

(Page 107.)

Whereas, K. C. claims of the estate of A. B., deceased, the sum of — dollars, upon [*here mention particularly the nature and origin of the claim*], and has presented said claim to C. D., administrator of said estate [*or, executor of the last will and testament*] of said A. B., deceased, for allowance; and whereas, the said C. D. disputes the validity of said claim [*or, disputes that the amount claimed is justly due to said K. C.*]; it is therefore agreed between the said K. C. and C. D. to refer the matter in controversy to the arbitrament and award of P. T., R. M., and U. S.; and that said referees shall be submitted for approval to R. L., a justice of the peace [*or, if the claim exceeds one hundred dollars, then say, to the approval of the probate judge*] of — county, Ohio* [*naming the county in which the claimant or the administrator resides*]. That this agreement, with the approval of the referees, shall be filed with said R. L. [*or, with any other justice of the peace of the county, if desired*], and such other and further proceedings as are authorized by law shall be had by and before him.

Should the claim exceed one hundred dollars, and the referees be approved by the probate judge, all that follows the * may be omitted.

Signed and sealed by us this — day of —, A. D. 18—.

K— C—, [L. s.]

C— D—, [L. s.]

Administrator of A. B., deceased

—O—

51.

Approval of referees by justice.

(Page 107.)

I approve the referees within [*or, above*] named.

—, 18—.

R— L—,

Justice of the peace, — township, — county, Ohio.

—O—

52.

Approval of referees by probate judge.

(Page 107.)

I approve the referees within [or, above] named.

— —, 18—.

W— B—,

Probate judge, — county, Ohio.

— O —

53.

Docket entries of the justice of the peace, and citation of referees.

(Page 108.)

K— C—

vs.

C. D., Administrator of the estate of A. B., deceased.

Arbitration.

18— March 5th.

Agreement to arbitrate, with approval of referees indorsed thereon, filed.

It is by me ordered that P. T., R. M., and U. S., the referees named, meet at my office [or, other place, to be named], on —, the — day of —, A. D. 18—, at — o'clock, forenoon, to hear and determine the matters in controversy between the parties, etc.

The citation of the referees may be as follows:

The State of Ohio, — county, — township, ss.

To P. T. [or, R. M.; or, U. S.], greeting:

Whereas, certain matters in dispute between K. C. and C. D., administrator of the estate [or, executor of the last will and testament] of A. B., deceased, have by agreement of the parties been referred for adjustment to P. T., R. M., and U. S.; and whereas, said parties have filed their said agreement with me for further proceedings, you are therefore hereby required to be and appear in your own proper person, at —, on —, the — day of —, A. D. 18—, at — o'clock, forenoon, then and there, in conjunction with the other referees, to hear and determine the matter aforesaid.

Witness my hand and seal, this — day of —, A. D. 18—.

R— L—, [L. s.]

Justice of the peace, — township, — county, Ohio.

— O —

54.

Docket entries and rule made by clerk in arbitration case.

(Page 109.)

K— C—	Arbitration.	
vs.	18— June 1.	Agreement to arbitrate, with approval of referees by probate judge filed.
C— D—, Adm'r of the estate of A. B., deceased.	" " "	It is by me ordered that the matters in controversy between the parties be referred for adjustment to the referees aforesaid; and that they meet at —, on the — day of —, 18, at — o'clock, forenoon, and having been duly sworn, proceed to the discharge of their duties under this reference.
		J— L—,
	Clerk court common pleas, — county, Ohio.	

—o—

55.

Award of referees.

(Page 109.)

The undersigned, to whom were referred certain matters in controversy between K. C. and C. D., administrator of the estate [or, executor of the last will and testament] of A. B., deceased, more particularly mentioned in the agreement to arbitrate, signed by said parties on the — day of —, A. D. 18—, having been first duly sworn, and having heard the allegations and proofs of the parties, do determine and award:

1. That the said C. D., out of the assets of the estate of said A. B., deceased, applicable to that purpose, pay to said K. C. the sum of — dollars. [Or, that the claim of said K. C. is not a valid debt of the estate of said A. B., deceased, and that said administrator (or, executor) ought not to pay the same.]

2. That the costs of this reference be paid by said administrator [or, executor] out of the assets of said estate. [Or, by said K. C.]

Given under our hands and seals, this — day of —, A. D. 18—.

P— T—, [L. s.]

R— M—, [L. s.]

U— S—, [L. s.]

Costs of the reference:

Fees of justice, \$—.

“ “ constable, \$—.

“ “ witnesses, \$—.

“ “ referees, \$—.

—O—

56.

Confirmation of award of referees.

(Page 109.)

K— C—

vs.

C. D., administrator of the estate of A. B., deceased.

} Arbitration.

Now comes the said plaintiff [*or*, defendant] by —, his attorney, and produces to the court here the report of the referees appointed in this case, and it appearing upon examination that the proceedings of said referees have in all respects been in conformity to law, and no exceptions to their award having been filed by either of the parties, said award is approved and confirmed, and it is considered by the court that said * plaintiff recover against the said C. D., to be levied of the goods and chattels of said A. B., deceased, yet to be administered, the sum of — dollars [*the amount awarded to him*], and that said C. D., out of the assets of said estate in his hands, pay the costs of this reference, together with the costs which have accrued or may accrue in this court.

Should the award be in favor of the administrator, commence at the *:

Defendant pay the costs of this reference, together with the costs which have accrued or may accrue in this court, and that execution issue against him for the same according to law.

—O—

57.

Allowance or rejection of claim by executor or administrator.

(Page 110.)

Allowed as a valid claim against the estate of A. B., deceased [or, allowed; or, the within account; or, note, is allowed as a valid claim against the estate of A. B., deceased].

C—— D——,
Administrator [or, executor].

Not allowed as a valid claim against the estate of A. B., deceased [or, rejected; or, not allowed; or, so much of the within claim as is justly due, is allowed, etc.]

C—— D——,
Administrator [or, executor].
—o—

58.

Bond of legatee who demands his legacy before expiration of four years.

(Pages 124, 175.)

Know all men by these presents, that we, W. E., H. J., and P. R., are held and firmly bound unto C. D., the executor of the last will and testament of A. B., deceased, and unto his successors in the administration, in the sum of — dollars [*double the amount of the legacy*], to the payment of which we hereby jointly and severally bind ourselves, our heirs, executors, and administrators, if default be made in the condition following:

Whereas, by the last will and testament of the said A. B., deceased, duly admitted to probate, a legacy of — dollars, is bequeathed unto the said W. E., which the said W. E. requires the said C. D., as executor as aforesaid, to pay at the present time (four years from the date of the administration bond of the said C. D., not having yet expired); now if the said W. E. shall refund the amount of said legacy, or so much thereof as may be necessary to satisfy any demands that may hereafter be recovered against the estate of said deceased, and shall indemnify said C. D. against all loss and damage on account of the payment of such legacy, then this obligation to be void: otherwise to be and remain in full force and effect.

Signed and sealed by us this — day of —, A. D. 18—.

Executed in presence of

W—— E——, [L. s.]
H—— J——, [L. s.]
P—— R——. [L. s.]

59.

Order of probate judge requiring legatee to give preceding bond.

(Pages 124, 175.)

It appearing that W. E., one of the legatees of A. B., deceased, has demanded of C. D., executor of the last will and testament of said decedent, the payment of his legacy, before the expiration of four years from the date of the administration bond of said C. D., it is therefore ordered that said W. E., before receiving the amount of said legacy, give bond to the said C. D., in — dollars, with sureties to be approved by this court, conditioned according to law.

—O—

60.

(Several forms.)

Receipts or vouchers.

(Page 127.)

Received — —, 18—, of C. D., administrator of the estate [or, executor of the last will and testament] of A. B., deceased, one dollar, my fees as appraiser of personal [or, real] estate one day.

Or, — dollars, in full of principal and interest upon the within note.

Or, — dollars, in full of the above account.

Or, — dollars, in full of the allowance made by the appraisers for the support of myself and children twelve months.

Y — B —,

Widow.

Or, — dollars for a coffin for the deceased.

In all cases the purpose for which the payment is made, and the amount paid, should be specified.

—O—

61.

Presentation of claim due after four years, to the probate court, for allowance.

(Page 121.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

The undersigned respectfully represents that he holds a note [or, other claim] against the estate of A. B., deceased, dated —, 18—, calling for — dollars in — years from date, and that the same will not become due until after the expiration of four years from the date of the bond of C. D., administrator of the estate [or, executor of the last will and testament] of said A. B., deceased.

He therefore asks that said C. D. may be ordered to retain in his hands a sufficiency of the assets of said estate to pay said note when the same becomes due; or that said C. D. may be directed (in case his consent can be obtained) to pay said note out of the funds of said estate now in his hands, upon discounting the interest upon the amount of said note for the unexpired term.

R—— R——.

—o—

62.

Order of probate judge to pay preceding claim.

(Page 121.)

It appearing that R. R. has a valid claim against the estate of A. B., deceased, which will not become due until after the expiration of four years from the date of the bond of C. D., as administrator of said estate [or, executor of the last will and testament of said decedent],* it is ordered, by and with the consent of said R. R. and said C. D., that said C. D., out of the assets of said estate in his hands, pay to said R. R. the amount of his aforesaid claim, upon discount being made of the interest upon the same for the unexpired term. [Or, that C. D. retain in his hands sufficient assets of the estate of said A. B., deceased, to pay the claim of said R. R., when the same becomes due; or, commencing at the *, and E. B. and C. B., heirs at law of said decedent, offering to give bond to the said R. R., for the payment of his said claim, when the same becomes due, it is ordered that said heirs give bond to said R. R., in the sum of — dollars, with sureties to be approved by this

court, conditioned for the payment of the claim of said R. R., as aforesaid, in case the same should be proved to be a valid claim against said estate.]

—o—

63.

Bond of heirs under preceding order.

(Page 121.)

Know all men by these presents, that we, E. B., C. B., G. R., and C. T., are held and firmly bound unto R. R., in the penal sum of — dollars, to the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators, if default be made in the condition following:

Whereas, R. R. has filed his petition in the probate court within and for the county of —, and State of Ohio, alleging that he holds a claim against the estate of A. B., deceased, consisting of a note, dated —, 18—, and calling for — dollars in — years from date; and praying that inasmuch as said note will not become due until after the expiration of four years from the date of the bond of C. D., the administrator of the estate [*or*, executor of the last will and testament] of said A. B., deceased, said C. D. may be ordered to pay said claim forthwith, upon rebate of interest, or that he may be ordered to retain in his hands sufficient assets of said estate to pay said claim when the same becomes due; and whereas, the said E. B. and C. B., heirs at law of said A. B., deceased, have offered to said probate court to give bond for the payment of said claim, in case the prayer of said R. R. should not be granted, which offer has been accepted by the court; now, therefore, if the said E. B. and C. B. shall pay the claim of said R. R., when the same becomes due, in case it shall be proved to be a valid debt of said estate, then this obligation to be void; otherwise to be and remain in full force and effect.

Signed and sealed by us, this — day of —, A. D. 18—.

Executed in presence of

E— B—, [L. S.]

C— B—, [L. S.]

G— R—, [L. S.]

C— T—, [L. S.]

64.

Petition of executor or administrator for leave to give notice of appointment.

(Page 123.)

To the Hon. the Judge of the Probate Court within and for the
county of —, and State of Ohio:

Your petitioner, C. D., executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased, respectfully represents that by accident [*or*, mistake] he failed to give notice of his appointment within the three months limited for that purpose by law, and that he has but recently discovered that such notice was not given.

He therefore prays that he may be authorized to give said notice now, and that he may be permitted to perpetuate the evidence of the publication of the same as if such notice had been given within the legal period aforesaid.

C—— D——,

Executor of A. B., deceased.

—O—

65.

Order of probate court in the preceding case.

(Page 123.)

Upon petition of C. D., executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased, and it appearing that said C. D., by accident [*or*, mistake] failed to give notice of his appointment according to law, leave is granted the said C. D. to give such notice now, as of the time when the same ought to have been given.

—O—

66.¹*Petition for sale of real estate to pay debts.*

(Pages 131, 132, 135, 136.)

CASE No. —.

C. D., administrator of the estate
of A. B., deceased, plaintiff,

vs.

E. F., G. H., I. K., S. T., U. V., A. V.,
L. B., a minor over fourteen years
of age; M. B. and N. B., minors
under fourteen years of age; Y.
B., widow of said decedent, and
the heirs of R. B., deceased, de-
fendants.— county, Ohio, ss., Probate
Court.

Petition to sell real estate.

The said plaintiff represents that valid debts of decedent, amounting to — dollars, have already been presented to your petitioner for payment (a schedule of which debts is hereto attached); that the costs of administration will amount to about — dollars, and that the total value of the personal estate and effects of said decedent is but — dollars, being wholly insufficient to pay the debts and costs aforesaid; and that it is therefore necessary to sell real estate of said decedent to pay said debts.

Said plaintiff further represents that said A. B. died seized in fee simple of the following described real estate, situate in the county of —, and State of Ohio, to wit: [*Here describe the property.*]

Said plaintiff further represents that said real estate was appraised in accordance with an order of the court by the appraisers of the personal property of said decedent, and that the amount of said appraisal is \$—; that said decedent died leaving the said Y. B. his widow, who is entitled to dower in said premises; that [*and in a similar manner clearly state any other facts directed by law or required by the circumstances of the case to be stated.*]

Said plaintiff therefore prays that [*here ask whatever the facts and circumstances above set forth require; for instance, among other things*] the dower of said Y. B. may be set off and assigned to her in said premises; and that your petitioner may be authorized to sell said premises, subject to said dower estate, to pay said debts, according to the statute in such case made and provided.

C — D —, Administrator,

[or, C — H —, Attorney for plaintiff.]

State of Ohio, — county, ss.

C. D., the plaintiff named in the foregoing petition, being duly

(1) See note, Form 68.

sworn, says that the various matters and things set forth in said petition are true, to the best of his knowledge and belief.

C—— D——.

Sworn (*or*, affirmed) to and subscribed before me, this — day of —, A. D. 18—.

W—— J——,

Notary public, — county, Ohio,

[*or*, other competent officer.]

—O—

67.¹

Waiver of summons, and consent to sale.

(Pages 138, 139, 140, 207.)

C. D., administrator of the estate of	} Waiver of summons, and consent to sell.
A. B., deceased, plaintiff,	
vs.	
E. F. and others, defendants.	

We, the undersigned parties defendant to the petition in said cause, hereby waive issuing and service of summons, and voluntarily enter our appearance as such defendants. [*Here also add, if so.*] And we do hereby consent to the sale of the real estate described in said petition, according to the prayer of the same.

E—— F——,

G—— H——.

—O—

68.

Precipe to foregoing petition.

(Pages 135, 140, 207.)

C. D., administrator of the estate of A. B.,	} Precipe.
deceased, plaintiff,	
vs.	
E. F. et al., defendants.	

The clerk will issue summons for J. K.; for S. B., a minor over fourteen years of age, and for M. B. and N. B., minors under fourteen years of age.

C—— D——,

Administrator,

[*or*, C—— H——, Attorney for plaintiff.]

NOTE.—In the title of the case in the petition, great care should be taken to name all persons who ought to be parties defendant, and to designate such of the minors as are over and

(1) See note, Form 68.

such as are under fourteen years of age, as the manner of service upon these prescribed by the statute must be strictly complied with (see note 2, page 139), and the sheriff must know their ages to this extent, so as to serve summons accordingly. If any of the defendants are sued in their official capacity, as executors, guardians, etc., they should be described as such.

If the petition, waiver of notice, and precipe be on separate pieces of paper, the number of the case, the names of the parties, the name of the county and court should be stated as at beginning of petition, but in the waiver of summons all of the defendants need not again be named. If there be no waiver of summons, the body of the precipe may be as follows: "Issue summons for all defendants."

Generally, the petition, its authentication, the waiver, and the precipe, should follow one another on the same sheet of paper, in the order named.

—O—

69.

Direction for sheriff.

(Pages 135, 140, 207.)

No special form need be observed. The following would be explicit enough :

C. D., administrator of A. B.,	} Case No. —, — Co., Ohio, Probate Court.
vs. E. F. and others.	

E. F. and G. H. have voluntarily entered their appearance, and need not be served. J. K. is usually in his office, No. —, — street, this city, and resides in the village of —, this county. S. T. lives and works on his farm, about two miles east of said village. The residence of U. V. is unknown. A. V. lives at —, — county, Iowa. Said minors all live with their parents, No. —, — street, this city, where they and their father may generally be found after — o'clock, P. M.

—O—

70.

Affidavit to obtain publication, etc.

(Pages 136, 137, 207.)

CASE No. —.

C. D., administrator of the estate of A. B., deceased, plaintiff,	} —county, Ohio, ss., Probate Court. Affidavit to obtain publication, and that the [names and] residences of certain defendants are unknown.
vs. E. F. et al., defendants.	

State of Ohio, — county, ss.

C. D., the said plaintiff, being sworn, says that the defendant, A. V.,

is a non-resident of Ohio, and that service of summons on him can not be made in this state; that the residence of U. V. is [*or, if so, say, the residence of the defendant, U. V., and the names and residences of the heirs of R. B., deceased, defendants, are*] unknown to the plaintiff, and can not with reasonable diligence be ascertained, such diligence for that purpose having already been used, and that service of summons upon him [*or, them*] can not be made; and that the case is one of those mentioned in Section 5048 of the Revised Statutes of Ohio.

C ——— D ———.

Sworn [*or, affirmed*] to and subscribed before me, this ——— day of ———, A. D. 18—.

B ——— M ———,
Probate judge.

————— O —————

71.

Notice to parties by publication, and proof of same.

(Pages 62, 99, 114, 136, 137, 138.)

LEGAL NOTICE [*or, simply, NOTICE*].

A. V., who resides at ———, in ——— county, Iowa; [*add, if so*] U. V., whose residence is unknown; [*also add, if so*] and the unknown heirs of R. B., deceased, one of the heirs at law of A. B., deceased, will take notice that C. D., administrator of the estate [*or, executor of the last will and testament*] of A. B., deceased, on the ——— day of ———, A. D. 18—, filed his petition in the probate court within and for the county of ———, and State of Ohio, alleging that the personal estate of said decedent is insufficient to pay his debts and the charges of administering his estate; that he died seized in fee simple of the following described real estate situate in said county, to wit: [*here describe the property*]; that Y. B., as widow of said decedent, is entitled to dower in said premises; and [*here also state the other material facts of a similar nature contained in the petition*].

The prayer of said petition is for the assignment of dower to said Y. B., for a sale of said premises, subject to such dower estate, for the payment of the debts and charges aforesaid, for [*here also state the other objects, if any, sought for in the petition*].

The persons first above mentioned will further take notice that they have been made parties defendant to said petition, and that they are

required to answer the same on or before the — day of —, A. D. 18—.

C— D—,

Administrator [or, executor] as aforesaid.

—, 18—.

The publication of this notice must be proved by affidavit, which may be as follows :

State of Ohio, — county, ss.

X. Y., being duly sworn, says that he is the publisher [*or, foreman, or otherwise, as may be*] of the —, a newspaper printed * and in general circulation in said county, and that a notice, of which the annexed is a true copy, was published in said paper on — of each week for six consecutive weeks, beginning on the — day of —, 18—.

If said paper be a daily, the following may be added :

Affiant further says that a daily and weekly edition of said newspaper is published ; that said notice appeared in the *daily* edition ; that the circulation of the *daily* in said county exceeds that of the weekly, and that the cost of publication in the *daily* does not exceed that in the weekly.

X— Y—.

Sworn [*or, affirmed*] to and subscribed before me, this — day of —, 18—.

S— C—,

Notary public, — county, Ohio.

When the affidavit is made by the executor or administrator, the foregoing may be altered as follows :

C. D., being duly sworn, says that the — is a newspaper printed [*and conclude as above after the **].

A copy of the notice must be attached to the affidavit in either case.

— O —

Bond of persons interested in estate for the payment of debts, in order to stay sale of real estate.

(Page 140.)

Know all men by these presents, that we, C. B., E. B., L. S., and R. H. are held and firmly bound unto C. D., administrator of the estate [*or, executor of the last will and testament*] of A. B., deceased, in the sum of — dollars, to the payment of which we hereby jointly and severally bind ourselves, our heirs, executors, and administrators, if default be made in the condition following :

Whereas, the said C. D., as administrator [*or, executor*] as aforesaid, on the — day of —, 18—, filed his petition in the probate court within and for the county of —, and State of Ohio, alleging that the

personal estate of the said decedent is insufficient for the payment of his debts and the charges of administering his estate, and praying for the sale of certain real estate therein described to pay the same; now, if the said C. B. and E. B., heirs at law of said A. B., deceased [*or, other person interested*], shall pay all the debts mentioned in said petition and the schedule thereto attached, that shall eventually be found due from said estate, with the charges of administering said estate, and the allowance in money to the widow, in case the personal estate of said decedent shall be insufficient therefor, and in case an order for the sale of said real estate shall not be granted by said court, then this obligation to be void: otherwise to be and remain in full force and effect.

Signed and sealed by us this — day of —, A. D. 18—.

Executed in presence of

C— B—, [L. s.]

E— B—, [L. s.]

L— S—, [L. s.]

R— H—, [L. s.]

—O—

73.

Order to assign dower and appraise.

(Page 142.)

C. D., administrator of the estate
[*or, executor*] of A. B., de-
ceased,

vs.

Y. B. and others.

} Petition to sell real estate.

On motion to the court by —, counsel for plaintiff, it is ordered that R. T., H. O., and C. G., three judicious, disinterested men of the vicinity, freeholders, being first duly sworn, do, upon actual view of the premises in the petition described,* set off and assign unto Y. B., widow of said A. B., deceased, one full, equal third part of the same as her dower estate therein; and that they make return of such assignment, together with a just valuation of said real estate, subject to such dower, to this court, with all convenient speed.

When not otherwise specially ordered, the committee are authorized to appraise all the real estate mentioned in the petition, even though it should be situate in more than one county.

—O—

74

Order to appraise and sell, free of dower.

(Page 142.)

*Follow preceding form to the *, and add: make a just valuation of the same in money; and that said plaintiff thereupon proceed, according to law, to sell said real estate, upon the premises, at not less than two-thirds of such appraised value, upon deferred payments not exceeding two years.*

Should there be a widow, and should she elect to take the value of her dower in money, the entry should show that she filed her answer waiving an assignment of dower, and the order should be that the property be appraised and sold free from dower. When the sale is to take place at the door of the court house, the order of the court need not specify the place. It is only when sale is to be made elsewhere that the order must mention the place.

— O —

75.

Appointment of guardian ad litem.

(Page 139.)

C. D., administrator of the estate [or, executor] of A. B., deceased,	} Petition to sell real estate.
<i>vs.</i> Y. B. and others.	

On motion,* — Esq., is appointed guardian *ad litem* for C. B. and and R. B., minors, defendants to said petition.

— O —

76.

Order of sale subject to appraisement in inventory.

*Follow the preceding form to the *, and add: and it appearing that by order of the court an appraisement of the premises described in the petition was made by the appraisers of the personal estate of said A. B., deceased, and inserted in the inventory, and that said A. B., deceased, left no widow, it is ordered that said plaintiff proceed according to law to sell said real estate, upon the premises, at not less than two-thirds of such appraised value, upon deferred payments not exceeding two years.*

— O —

77.

Oath of appraisers of real estate.

(Page 143.)

The State of Ohio, — county, ss.

R. T., H. O., and C. G., being sworn, say that they will faithfully and impartially discharge all the duties enjoined upon them by law, as appraisers of the real estate of A. B., deceased, under an order of the probate court of said county, in the case of C. D., administrator of the estate [*or, executor*] of said A. B., deceased, against Y. B. and others, according to the best of their understanding and ability.

R — T —,
H — O —,
C — G —.

Sworn to and subscribed before me, this — day of —, A. D. 18—.

L — L —,

Justice of the peace [or, other proper officer].

—o—

78.

Report of appraisers.

(Pages 143, 144, 146.)

First insert certificate of oath, Form No. 77.

<p>C. D., administrator of the estate [<i>or, executor</i>] of A. B., deceased, <i>vs.</i> Y. B. and others.</p>	}	<p>In the Probate Court of — county, Ohio. Petition to sell real estate.</p>
--	---	--

In compliance with the order of the court in this case, the undersigned (having been first duly sworn, and having actually viewed the premises in said petition described) do set off and assign unto Y. B., widow of A. B., deceased, as her dower estate * in said premises, the following described portion [*or, portions*] of the same, to wit: [*Here describe, by metes and bounds, and distinctly, the tract or tracts set off.*]

And we do appraise the value of said premises, subject to said dower estate, at — dollars.

Given under our hands, this — day of —, A. D. 18—.

R — T —,
H — O —,
C — G —.

Fees of appraisers:

R. T., — days,.....	\$—.
H. O., — “	\$—.
C. G., — “	\$—.
Surveyor P. P. fees.....	\$—.
L. L. Jus. Peace, sw'g app.....	25 cts.

When several tracts are described in the petition, and dower is assigned in one tract for all, the foregoing form may be altered at the *, as follows: in all the real estate mentioned in said petition, the following described tract [or, tracts] to wit: [*Here describe the dower.*] And we do appraise the value of said several tracts as follows: The one containing — acres, in which dower has been assigned, and subject to and incumbered by said dower, at — dollars; the one containing — acres, which is unincumbered by dower, at — dollars, etc., etc.

Should dower be assigned specially, as of rents and profits, Form No. 78 may be altered as follows—commence after the parenthesis: do find that said premises are not divisible, and that dower can not be assigned therein by metes and bounds; and in lieu of such dower we do assign to Y. B., widow of said A. B., deceased, — dollars, being one-third of the estimated net yearly rents and profits of said premises, to be paid to her annually during life. And we do estimate and appraise said real estate, subject to the payment of said annuity, at — dollars.

And close as in the first instance. Should the allowance in lieu of dower be made a lien upon several tracts or lots, the amount charged upon each should be specifically stated, and the appraisement should be made accordingly.

Should the appraisers set off a homestead, the following may be inserted after the dower in Form 78:

And we do set off and assign unto Y. B., widow, and E. B. and C. B., minor children [*or, to Y. B., widow; or, to E. B. and C. B., minor children*] of A. B., deceased, as a homestead, the following described parcel of the real estate in the petition described, estimated to be of the value of five hundred dollars, to wit: [*Here describe the homestead.*]

And the report should show that the appraisement was made subject to dower and a homestead.

79.

Report of appraisers approved, and sale ordered.

(Page 147.)

C D., administrator of the estate [or, executor] of A. B., de- ceased, vs. Y. B. and others.	}	Petition to sell real estate.
--	---	-------------------------------

Now comes —, counsel for the plaintiff, and produces to the court the report of an assignment of dower and appraisement herein made by R. T., H. O., and C. G., in pursuance of a former order of this court; and it appearing upon examination that said report is in all respects regular and correct, the same is hereby approved and confirmed; and it is ordered that said plaintiff proceed according to law to sell the real estate in the petition described, subject to said dower estate, upon the premises, at not less than two-thirds of such appraised value, and upon deferred payments not exceeding two years.

—o—

80.

Bond of executor or administrator when he is ordered to sell more real estate than necessary to pay debts.

(Page 147.)

Know all men by these presents, that we, C. D., U. V., and W. X., are held and firmly bound unto the State of Ohio in the sum of — thousand dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators, if default be made in the conditions following:

Whereas, in a certain cause pending in the probate court of the county of —, and State of Ohio, wherein C. D., executor of the last will and testament [or, administrator of the estate] of A. B., deceased, is plaintiff, and Y. B. and others are defendants, the said C. D. has been ordered by said court to sell more real estate than will be necessary for the payment of the debts of said decedent and the charges of administering his estate: Now, if the said C. D. shall account for and pay over, to the persons legally entitled thereto, all the proceeds of the real estate so ordered to be sold, that shall remain after the pay-

ment of the debts and charges aforesaid, then this obligation to be void: otherwise to be and remain in full force and effect.

Signed and sealed by us this — day of —, A. D., 18—.

Executed in presence of

C— D—, [L. s.]

U— V—, [L. s.]

W— X—. [L. s.]

—O—

81.

Notice of sale to be published or posted up.

(Page 149.)

ADMINISTRATOR'S SALE OF REAL ESTATE.

In pursuance of an order of the probate court of — county, Ohio, I will offer for sale, at public auction, on —, the — day of —, 18—, at — o'clock, forenoon, upon the premises, the following described real estate, situate in the county of — and State of Ohio, to wit: [*Here describe the property*].

Appraised at \$—. Terms of sale: One-third in hand, one-third in one year, and one-third in two years from the day of sale, with interest; the payments to be secured by mortgage upon the premises sold.
— —, 18—. C— D—,

Administrator [or, executor] of A. B., deceased.

The terms may be altered to suit the order of the court. For suggestions relative to terms, see Chapter VII.

—O—

82.

Report of executor or administrator when no sale is effected.

(Pages 149, 150.)

C. D., administrator of the estate
[or, executor] of A. B., deceased,
vs.
Y. B. and others.

In the Probate Court of —
county, Ohio. Petition to sell
real estate.

In pursuance of the order of court in this case, I gave notice of sale by publication in the —, a weekly newspaper of general circulation in said county of —, for at least four successive weeks prior to the — day of —, 18—; and on that day, at — o'clock, forenoon, upon the premises, in accordance with said notice of sale, I offered the real

estate in the petition described for sale, subject to the dower estate of Y. B. therein; and no bid being offered, said premises were not sold.

I thereupon gave notice of sale by publication [*and continue as before*].

In order to obtain a reappraisement, it is necessary to show that the property was advertised and offered twice.

— — —, 18—.

C — — — D — — —,

Administrator [or, executor] of A. B., deceased.

— O —

83.

Order of reappraisement.

(Pages 149, 150.)

C. D., administrator of the estate
[or, executor] of A. B., de-
ceased,
vs.
Y. B. and others.

} Petition to sell real estate.

On motion to the court by — — —, counsel for the plaintiff, and it appearing that the real estate described in the petition has been twice offered for sale and not sold for want of bidders*, it is ordered that the appraisement heretofore made may be set aside, and that said premises be reappraised by the oaths of D. H., O. B., and F. S.; and that said plaintiff thereupon proceed to sell said premises subject to such reappraisement, in accordance with the former order of this court.

— O —

84.

Order to sell at a fixed price.

(Pages 149, 150.)

Follow the preceding form to the *, and add :

It is ordered that said plaintiff proceed to sell said premises according to law and the previous order of this court at a sum not less than — — — dollars.

— O —

85.

Report of sale.

(Page 150.)

<p>C. D., administrator of the estate [or, executor] of A. B., deceased, vs. Y. B. and others.</p>	}	<p>In the Probate Court of — county, Ohio. Petition to sell real estate.</p>
---	---	--

In pursuance of the order of the court in this case, I gave notice of sale by publication in the —, a weekly newspaper of general circulation in said county of —, for at least four successive weeks prior to the — day of —, 18—; and on that day, at — o'clock, forenoon, upon the premises, in accordance with said notice, I offered the real estate in the petition described for sale, subject to the dower estate of Y. B. therein, when R. P. bid to pay for the same the sum of — dollars, which being the highest and best bid that was offered, and more than two-thirds of the appraised value of said premises, I then and there sold the same to him, subject to said dower estate, for that sum. Terms of sale: One-third of the purchase money to be paid in hand, one-third in one year, and one-third in two years from the day of sale, with interest, the payments to be secured by mortgage upon the premises sold.

—, 18—.

C — D —,

Administrator [or, executor] of A. B.; deceased.

If the property was sold at private sale by order of court, report accordingly, and attach the affidavit given as Form No. 155.

—o—

86.

Sale approved and deed ordered.

(Page 151.)

Now comes said plaintiff [or, —, counsel for the plaintiff], and produces to the court the report of a sale made by said plaintiff in pursuance of an order hereinbefore made; and it appearing upon examination that said sale has in all respects been legally made, the same is approved and confirmed; and said plaintiff is ordered to execute and deliver to the purchaser at said sale, a proper deed for the real estate so by him sold as aforesaid.

If there be a widow, and her dower be paid to her in money in lieu of land or of rents and profits, the amount so allowed her should be fixed by the court, and be stated in this entry. Should there be other liens on the land sold, the court may also order a distribution of the proceeds of the sale, in case such order has not been made.

87.

Deed of executor or administrator; two forms.

(Page 151.)

Know all men by these presents, that, whereas C. D., as executor of the last will and testament [*or, administrator of the estate*] of A. B., deceased, on the — day of —, A. D. 18—, filed his petition in the probate court within and for the county of —, and State of Ohio praying for an order to sell the following described (among other) real estate of the said A. B., deceased, situate in said county, to wit: [*here describe the property*], for the payment of the debts of said decedent, and the expenses of administering his estate. And whereas, such proceedings were had that the dower estate of Y. B., as widow of said decedent, was assigned to her in said premises, as follows: [*Here describe the dower*]. And said C. D. was ordered to sell said premises at public auction [*or, at private sale, as the case may be*], according to law, subject to said dower estate. And whereas, said C. D. [*here say, if so, having first duly advertised said premises for sale*], on the — day of —, 18—, sold the same, subject to said dower estate, at public auction [*or, at private sale, as may be*], to R. P., for the sum of — dollars; and the said R. P., having complied with the terms of sale, said sale was afterward approved and confirmed by said court, and said C. D. was ordered to execute and deliver to said purchaser a proper deed for said premises, according to the statute in such case made and provided: all which will more fully appear by the records of said court, to which reference is here made.

Now, therefore, I, the said C. D., as executor [*or, administrator*] as aforesaid, in consideration of the premises, and by virtue of the powers in me vested by law and the order of said court, do hereby give, grant, bargain, sell, and convey, unto the said R. P., the real estate aforesaid, subject to said dower estate, with all and singular the appurtenances.

To have and to hold the same unto the said R. P., and unto his heirs and assigns forever.

In testimony whereof, I, as executor [*or, administrator*] as aforesaid, hereto set my hand and seal, this — day of —, A. D., eighteen hundred and —.

Executed in presence of

C—— D——, [L. s.]

C—— C——,

As executor [*or, administrator*] as above

L—— L——.

mentioned.

[*Here follows the acknowledgment. See next page.*]

NOTE.—The recitals in the first paragraph above should, of course, conform to the facts in each case. For instance, if the decedent left no widow, there will be nothing to say about proceedings as to dower. These recitals may be made even more extensive, if desired; but this is unnecessary. The briefer form, given on next page, is, perhaps, preferable to the longer one on this page.

Another form.

Know all men by these presents, that, whereas, by virtue of an order of sale made by the probate court within and for the county of —, and State of Ohio, C. D., as executor of the last will and testament [*or, administrator of the estate*] of A. B., deceased, on the — day of —, 18—, sold at public auction [*or, at private sale*], to R. P., for the sum of — dollars, for the payment of lawful claims against the estate of said A. B., deceased, the following described real estate of said A. B., deceased, to wit: [*here describe the property*], subject to the dower estate of Y. B. therein, which is as follows: [*here describe the dower*], which sale was afterward approved and confirmed by said court, and said C. D. was ordered to execute and deliver to said R. P. a deed for said premises, subject to said dower estate, according to the statute in such case made and provided: all which will more fully appear by the records of said court, to which reference is here made.

Now, therefore—*conclude as in the preceding form.*

ACKNOWLEDGMENT.

The State of Ohio, — county, ss.

On this — day of — A. D. 18—, before me, the undersigned authority, personally came the above-named C. D., the executor of the last will and testament [*or, the administrator of the estate*] of A. B., deceased, the grantor in the foregoing deed, and, as such executor [*or, administrator*], acknowledged the signing and sealing thereof to be his voluntary act and deed, for the uses and purposes therein specified.

Witness my hand and seal, the day and year last above mentioned.

H— M—,

Notary public,

— county, Ohio.

—o—

Motion by executor or administrator for an order to apply a portion of the avails of a sale in partition to the payment of debts, etc.

(Page 153.)

In the Court of Common Pleas of — county, Ohio:

C— B— et al.

vs.

R— B— et al.

} In partition.
} Motion for application of a portion
} of the purchase money.

C. D., administrator of the estate [*or, executor*], of A. B., deceased respectfully represents that the personal estate of said decedent, subject to administration, amounts to — dollars, and that the valid debts of said decedent, with the expenses of administering his estate, amount to — dollars.

Further represents that the real estate sold by proceedings in this case is liable for the payment of said deficit.

He therefore asks the court to make an order, directing that out of the first moneys arising from said sale, an amount sufficient to pay the residue of said debts and expenses be paid to him by the sheriff of said county.

C—— D——,

Administrator [or, executor] of A. B., deceased.

This motion should be accompanied by a certificate of the probate judge, showing that the amount asked for will be necessary for the payment of the debts of the decedent. See Form No. 157.

—O—

89.

Account of executor or administrator for settlement with the court.

(Pages 156, 157.)

Final [or, partial¹] account of C. D., executor of the last will and testament [or, administrator of the estate] of A. B., deceased.

Accountant charges himself as follows:

Amount of sale bill.	\$——
“ received of G. H. on note—Principal.	\$——
Interest.....	——
“ “ “ L. S. “ book account	——
“ “ “ T. C. “ note (not inventoried).....	——
“ “ for one hog (not inventoried) sold at private sale.....	——
“ “ of R. P. on real estate sold him.....	——
“ of interest received on sale notes	——
“ received of the administrator of the estate of H. B., deceased, the father of A. B., deceased.....	——
Etc.,	Etc.

And accountant claims credit for the following payments, made in behalf of said estate:

Paid M. N., appraiser	Voucher No. 1.....	\$——
“ R. S., auctioneer.....	“ “ 2.....	——
“ C. T., for threshing grain.....	“ “ 3.....	——
“ C. C., for coffin for deceased.	“ “ 4.....	——
“ Y. B., widow's allowance.....	“ “ 5.....	——
“ T. R., physician's bill, last sickness.....	“ “ 6.....	——

¹ Where several accounts are filed, it is a good practice to entitle them First account, second account, final account of, etc.

Paid L. S., in full of note.....	Voucher No. 7.....	\$ —
" J. R., " " account.....	" " 8.....	—
" S. C., legacy in full.....	" " 9.....	—
Etc.,	Etc.	

Accountant claims the ordinary legal compensation for his services. And asks that he may be allowed, as compensation for extra services performed, the additional sum of \$90.00, for the reasons following:

Accountant says that G. H., from whom he collected the sum of — dollars, resides in St. Paul, Minnesota; and that he was compelled to make several trips to that place, in order to secure to the estate the payment of said claim. His necessary expenses were — dollars, and the time employed — days. For these he thinks an extra allowance of \$90.00 to be but reasonable.

The notes against T. U., V. W., and R. S., mentioned in the inventory, were not collected, on account of the insolvency of said debtors.

The book account against X. Y., mentioned in the inventory, was paid in the lifetime of the decedent, as appears by his receipt, exhibited to me by said X. Y.

C — D —,
Executor [or, administrator] of A. B., deceased.

When an account is filed within the time allowed by law or the court, the dates of the various receipts and payments need not be given. The foregoing form is preferable to making schedules of the various items of receipt and payment: 1. Because it is not so complicated. 2. Because only persons of experience in administration business can properly arrange the items in their appropriate schedules; and, 3. Because such schedules are unnecessary, whether the estate be solvent or insolvent.

— O —

90.

Affidavit to partial or final account.

(Page 163.)

The State of Ohio, — county, ss.

C. D., executor of the last will and testament [or, administrator of the estate] of A. B., deceased, being sworn, says that the foregoing account is in all respects just and correct, as he verily believes [if any of the property were sold at private sale by order of court, here add], and that the private sale of the property therein mentioned as made by order of court, was made after diligent endeavor to obtain

the best price for the same, and that the sale reported is for the highest price that could be obtained for said property.

C—— D——.

Sworn [*or*, affirmed] to and subscribed by said C. D., before me, this
— day of —, A. D. 18—.

W—— B——,
Probate judge

—O—

91.

Authentication of account of executor or administrator against the estate of the decedent.

(Page 113.)

An affidavit may be made to the account according to Form 49; and, if required, a receipt in the same form as in the case of another creditor.

—O—

92.

Settlement of account and order of distribution.

(Page 165.)

Final [*or*, partial] account of C. D., executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased.

This account having been carefully examined, is approved and settled. The court finds that after payment of all valid claims against said estate there remains in the hands of said executor [*or*, administrator] a balance of — dollars, which he is ordered to distribute according to the will of said decedent [*or*, according to law].

—O—

93.

Receipts of heirs, upon final distribution of estate.

(Page 175.)

Received — —, 18—, of C. D., executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased, — dol.

lars, in full of * my share of said estate as one of the heirs at law of said decedent, upon final distribution.

C—— B——.

*When the money is received by a guardian for his ward, the receipt may proceed from the * as follows: the share of E. B., as one of the heirs at law of said decedent, upon final distribution.*

F—— T——,

Guardian of E. B.

*When a receipt is taken from a husband and wife for the wife's share of an estate, the above form may be altered at the * as follows: the share of ——, as one of the heirs at law of said decedent, upon final distribution.*

—o—

94.

Account of distribution among heirs.

(Page 176.)

To the Hon. the Judge of the Probate Court within and for the county of ——, and State of Ohio:

The undersigned, executor of the last will and testament [or, administrator of the estate] of A. B., deceased, respectfully reports, that in pursuance of the order of said court, he made distribution of the amount found in his hands upon final settlement as follows:

To Y. B., widow of the decedent,	Voucher No. 1, \$——
" C. B., heir at law of the decedent,	" " 2, ——
" E. B., " " " "	" " 3, ——

C—— D——,

Executor [or, administrator] of A. B., deceased.

The State of Ohio, —— county, ss.

C. D., being sworn, says that the foregoing account of the distribution of the estate of said A. B., deceased, is in all respects correct.

C—— D——.

Sworn [or, affirmed] to and subscribed by said C. D., before me, this —— day of ——, A. D. 18——.

W—— B——,

Probate judge.

—o—

95.

Order of probate court to invest unclaimed money.

(Page 176.)

In the matter of the estate of A. B., deceased :

It appearing that the sum of — dollars, to which L. B. is entitled under the order of distribution made by this court upon settlement of the account of C. D., executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased, has remained for more than six months unclaimed by said L. B., it is therefore ordered that said C. D. loan said amount, upon bond and mortgage, to accumulate for the benefit of said L. B.; according to the statute in such case made and provided.

—O—

96.

Memorandum of investment under preceding order.

(Page 176.)

In pursuance of the order of the probate court of — county, Ohio, I have loaned the sum of — dollars, to which L. B., as one of the heirs at law of A. B., deceased, was entitled under the order of distribution of said estate, and which remained in my hands for more than six months, unclaimed, to —, for — years, with interest at the rate of — per centum per annum, and have taken the bond of said — with a mortgage upon certain of his real estate to secure the payment of the same, and have filed said bond and mortgage in said probate court, according to law.

C—— D——,

*Executor [*or*, administrator] of A. B., deceased.*

—O—

97.

Order of the probate court directing that the money invested under the order, Form No. 95, be paid to the person entitled thereto.

(Page 177.)

In the matter of the estate of A. B., deceased :

L. B. having made satisfactory proof to the court that he is the dis-

tributee entitled to the money loaned upon bond and mortgage by C. D., executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased, in pursuance of the order of this court, it is ordered that the clerk of the court of common pleas of this county, in whose hands the aforesaid securities now are, transfer and deliver the same to the said L. B.

— o —

98.

Petition to compel distribution.

(Page 177.)

The State of Ohio, — county, ss.

PROBATE COURT.

C — B —, plaintiff,	} Petition.
<i>vs.</i>	
C. D., executor of the last will and testament	
[<i>or</i> , administrator of the estate of A. B., deceased, defendant.	

C. B., the plaintiff, says, that as one of the heirs at law of A. B., deceased, he is entitled to — dollars, under the order of distribution made by the probate court within and for the county of —, and State of Ohio, upon settlement of the account of said C. D., as executor of the last will and testament [*or*, administrator of the estate] of said A. B., deceased.

Plaintiff further says, that although more than thirty days have elapsed since said order of distribution was made, the said C. D. has not paid to the plaintiff said sum of — dollars, nor any part thereof, although requested so to do; but to pay the same has wholly neglected and refused.

Wherefore the plaintiff asks judgment and execution against the said C. D., for said sum of — dollars, with interest thereon from the — day of —, A. D. 18—, being the day on which said money was demanded.

C — B —.

The State of Ohio, — county, ss.

C. B., being sworn, says he believes the statements of the foregoing petition to be true.

C — B —.

Sworn [*or*, affirmed] to and subscribed by the said C. B., before me, this — day of —, A. D.

— —, *Probate judge.*

99.

Citation of executor in preceding case.

(Page 177.)

The State of Ohio, — county, ss.

To C. D., executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased :

Whereas, C. B., on the — day of —, A. D. 18—, filed his petition in the probate court within and for the said county of —, alleging that as one of the heirs of said A. B., deceased, he is entitled to the sum of — dollars, with interest thereon from the — day of —, 18—, under the order of distribution made by said court, upon settlement of your account as executor [*or*, administrator] of said A. B., deceased, which you neglect and refuse to pay, although requested to make payment, and although more than thirty days have elapsed since said order of distribution was made. You are therefore hereby required to appear in said court, on or before the [*not less than twenty nor more than forty days from the date of the writ*], to answer said petition, and show cause, if any you have, why judgment should not be rendered and execution awarded against you for the amount claimed by said petitioner under the order of distribution aforesaid.

Witness my signature and the seal of our said court, at
[L. S.] —, this — day of — A. D. 18—.

W— B—,
Probate judge.

—o—

100.

Notice to party by publication.

(Page 178.)

LEGAL NOTICE.

C. D., who resides in the State of Indiana, will take notice that C. B., on the — day of —, A. D. 18—, filed his petition in the probate court within and for the county of —, and State of Ohio, alleging, that as one of the heirs at law of said A. B., deceased, he is entitled to the sum of — dollars, with interest thereon from the — day of —, 18—, under the order of distribution made by said court upon settlement of the account of said C. D. as executor [*or*, administrator

of the estate] of said A. B., deceased; and that although more than thirty days have elapsed since said order of distribution was made, and although payment has been demanded of said C. D., he has neglected and refused to pay said C. B. the amount claimed by him as aforesaid.

The prayer of the petition is for judgment and execution against the said C. D. for the amount due said C. B., as aforesaid.

Said petition will be for hearing on the [*at least six weeks' notice must be given*].

— — —, 18—.

C — — — B — — —.

Proof of publication must be made as directed in Form 71.

— O —

101.

Judgment against administrator or executor in preceding case.

(Page 178.)

<p>C — — — B — — —, ^{vs.} C. D., executor [<i>or</i>, administrator] of A. B., deceased.</p>	}	<p>Citation to enforce distribution.</p>
--	---	--

The said defendant having been legally served with process [*or otherwise, as the case may be*], and failing to appear and show cause why the plaintiff ought not to have judgment and execution against him for the amount claimed in the petition, this cause comes on for hearing upon said petition and the testimony. And the court being fully advised in the premises, finds the allegations of said petition to be true, and that there is due to the plaintiff, from the defendant, under the order of distribution mentioned in the petition, the sum of — dollars. It is therefore considered by the court that the said plaintiff recover against the said defendant said sum of — dollars, with the costs of this suit, taxed at —; and that execution issue against the goods and chattels, lands and tenements of said defendant, to make the same, according to law.

— O —

102.

Representation of insolvency.

(Page 181.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

The undersigned, executor of the last will and testament [or, administrator of the estate] of A. B., deceased, respectfully represents that the total value of the personal estate of said decedent is but — dollars; that the costs of administration and other preferred claims against said estate amount to — dollars, and that the balance of the assets, applicable to the payment of ordinary claims, will not exceed — dollars. That valid claims against said estate have been presented to and allowed by the undersigned, amounting to — dollars, as will appear by the following schedule:

<i>Name of creditor.</i>	<i>Nature of claim.</i>	<i>Original amount.</i>	<i>Interest.</i>	<i>Amount now due.</i>
C. T.	Note.	\$70 00	\$15 00	\$85 00
L. S.	Book account.	7 00	1 10	8 10
G. R.	Judgment.	170 00	11 00	181 00
C. C.	Note.	60 00	Bal. due.	16 10
etc., etc.				

Wherefore the undersigned asks that said estate may be declared insolvent, and that such proceedings may be had in the premises as are authorized by law.

—, 18—.

C— D—,

Executor [or, administrator] of A. B., deceased.

—o—

103.

Order of court, declaring insolvency of estate.

(Page 181.)

It appearing upon the representation of C. D., executor of the last will and testament [or, administrator of the estate] of A. B., deceased, that said estate is probably insolvent, it is ordered that said estate be, and hereby is, declared to be probably insolvent, and that * L. R. and

C. H. proceed according to law, as commissioners, to receive and examine claims against said estate; and it is ordered that they give notice of the times and places of sitting to receive and examine such claims, by publication for three weeks in the—*naming the newspaper*.

When no commissioners are appointed, it is the duty of the executor or administrator to proceed in their stead; and the foregoing form may be altered at the, as follows: said executor [or, administrator] give notice of the same by publication for six weeks in the —, a newspaper published at —, in the county of —, in the form prescribed by the statute.*

—O—

104.

Notice of insolvency; to be posted up or published.

(Page 182.)

NOTICE.

On the — day of —, in the year 18—, the probate court of — declared the estate of A. B., deceased, to be probably insolvent. Creditors are therefore required to present their claims against the estate to the undersigned, for allowance, within six months from the time above mentioned, or they will not be entitled to payment.

— —, 18—.

C— D—,

Executor [or, administrator] of A. B., deceased.

This form was copied from the statutes.

—O—

105.

Oath of commissioners of insolvency.

(Page 184.)

The State of Ohio, — county, ss.

L. R. and C. H. being sworn, say that they will faithfully and impartially discharge all the duties enjoined upon them by law as commissioners to receive and examine claims against the estate of A. B., deceased, which has been declared to be probably insolvent by the probate court of said county, according to the best of their understanding and ability.

L— R—,
C— H—.

Sworn [*or, affirmed*] to and subscribed before me, this — day of —, A. D. 18—.

W— P—,
Justice of the peace [*or other authorized officer*].

—O—

106.

Report of executor or administrator as commissioner of insolvency.

(Page 183.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

The undersigned,* executor of the last will and testament [*or, administrator of the estate*] of A. B., deceased, makes report, that he gave notice in due form of law of the probable insolvency of said estate; and that after carefully examining the claims against said estate presented to him for allowance, he has made disposition of the same as follows:

<i>Names of Credit'rs.</i>	<i>Nature of Claim.</i>	<i>Original amount.</i>	<i>Amount now due.</i>	<i>REMARKS.</i>
C. T.	Note,	\$70 00	\$86 50	Allowed. [ficient proof.
L. S.	Book Acc'nt,	7 00	8 96	Not allowed for want of suf-
G. R.	Judgment,	170 00	184 00	Allowed.
C. C.	Note,	60 00	62 00	Barred by stat. of limita'ns.
L. G.	Book Acc'nt,	4 07	4 80	Allowed.
etc., etc.				

Respectfully submitted,

—, 18—.

C— D—,
Executor [*or, administrator*] of A. B., deceased.

—O—

107.

Notice to be posted up or published by the commissioners.

(Page 184.)

NOTICE.

The creditors of A. B., deceased, will take notice, that the undersigned have been appointed commissioners to receive and examine claims against said decedent, and that they will sit for that purpose at

the office [*or, house*] of H. R., in —, on —, the — day of — 18—; on —, the — day of —, 18—; and on —, the — day of —, 18—. Unless the claims of creditors are presented to the undersigned for allowance upon one of the days mentioned, they will not be entitled to payment.

—, 18—.

L— R—,
K— C—,
Commissioners.

—o—

108.

Oath of claimant.

(Page 184.)

You do solemnly swear [*or, affirm*] that you will true answers make to such questions as shall be asked you, touching your claim against the estate of A. B., deceased, so help you God [*or, under the pains and penalties of perjury*].

—o—

109.

Oath of witnesses.

(Page 184.)

You do solemnly swear [*or, affirm*] that you will true answers make to such questions as shall be asked you, touching the matter now in hearing, so help you God [*or, under the pains and penalties of perjury*].

—o—

110.

Report of commissioners.

(Page 185.)

*Follow Form No. 106 to the *, and add:* Commissioners appointed by said court to receive and examine claims against the estate of A. B., deceased, respectfully report, that in pursuance of the order of the court they gave notice of the times and places of sitting to receive and

examine such claims; and that the following claims were presented to them, viz:

Here insert a schedule of claims as in Form 106.

Respectfully submitted,

— — — 18—.

L— — — R— — —,
C— — — H— — —,

Commissioners.

Should any claim presented to the commissioners be disallowed, and the claimant appeal from our decision, the report may state the facts as follows: Disallowed, and claimant appeals to the court of common pleas. Appeal bond in \$— filed.

—O—

111.

Bond of creditor for appeal from decision of commissioners of insolvency.

(Page 186.)

Know all men by these presents, that we, — and —, are held and firmly bound unto C. D., executor of the last will and testament [or, administrator of the estate] of A. B., deceased, in the sum of — dollars; to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators, if default be made in the condition following:

Whereas, L. R. and C. H., commissioners appointed by the probate court of — county, in the State of Ohio, to receive and examine claims against the estate of the said A. B., deceased, have refused to allow a claim of — dollars against the same presented by the said —; from which decision the said — has appealed to the court of common pleas of said county of —: Now, if the said — shall prosecute his said appeal to effect, and shall pay the costs that may have accrued thereon, and that may accrue thereon in the court of common pleas, in case his said claim shall be disallowed by the said court, then this obligation to be void: otherwise, to be and remain in full force and effect.

Signed and sealed by us, this — day of —, A. D. 18—.

Executed in presence of

— — —, [L. S.]
— — —, [L. S.]

—O—

112.

*Order of distribution after return made by commissioners, or executor
or administrator.*

(Pages 188.)

In the matter of the estate }
of A. B., deceased. }

The commissioners appointed by this court [or, the executor; or, administrator of said A. B., deceased] having made report that the valid claims against said estate amount to — dollars; it is ordered that the executor [or, administrator of the estate] of said decedent, after deducting from the assets in his hands the amount necessary to pay the costs of administration that may yet accrue, pay over to the creditors whose claims have been allowed under the proceedings in insolvency, an equal portion, according to their respective claims, of the balance of the assets then remaining; and that he make report to this court of such distribution.

—o—

113.

Receipt of creditor upon receiving dividend.

(Page 192.)

Received, — —, 18—, of C. D., administrator of the estate of A. B., deceased, — dollars and — cents, in full of the proportion of said estate applicable to the payment of the above [or, within] claim.

L—— L——.

—o—

114.

Report of distribution among creditors.

(Page 192.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

In compliance with the order of said court, I applied the assets of A. B., deceased. remaining in my hands, as follows:

Balance of assets after payment of preferred claims,..... \$—

From which deduct costs of administration which have accrued
 since filing partial account \$——
 Leaving for distribution among general creditors..... ———
 Amount of debts allowed as valid..... ———
 Dividend — per cent..... ———

The following is a schedule of the debts paid, with the amount paid upon each :

Names of Creditors.	Nature of Claim.	Original Amount.	Interest Due.	Total Due.	Amount Paid.	No. of Voucher.
C. T.	Note,	\$70 00	\$16 50	\$86 50	\$43 25	1
G. R.	Judgment,	170 00	14 00	184 00	92 00	2
L. G.	Book Account,	4 07	73	4 80	2 40	3
etc., etc.						

Respectfully submitted,

—— —, 18—.

C—— D——,

Executor [or, administrator] of A. B., deceased.

The State of Ohio, —— county, ss.

C. D., being sworn [*or, affirmed*], says that the foregoing account and statement are in all respects correct.

C—— D——.

Sworn [*or, affirmed*] to and subscribed before me, this —— day of ——, A. D. 18—.

W—— B——,

Probate judge.

———O——— .

115.

Petition of executor or administrator to complete contract of decedent for sale of land.

(Pages 136, 207.)

CASE No. ——.

C. D., executor of the last will and testament [*or, administrator of the estate*] of A. B., deceased, plaintiff,

vs.

... B., G. H., I. K., S. T., U. V., A. V.; L. B., a minor over fourteen years of age; M. B. and N. B., minors under fourteen years of age, defendants.

—— county, Ohio, ss. Probate Court [*or, Court of Common Pleas*].

Petition to complete contract for sale of land.

The said plaintiff represents that on the —— day of ——, A. D. 18—.

the said A. B., then in full life, entered into a contract in writing with the said E. F. for the sale of the following described real estate, situate in the county of —, and State of Ohio, to wit: [*describe the property*] upon the following terms: [*state the terms*] as will appear by said contract [*or, a copy of said contract*] hereto attached. [*Here set forth in plain language all other pertinent facts, as for instance:*]

That said L. R. paid to said A. B., in his lifetime, the first, second, and third installments, and has paid to said plaintiff, since the death of said A. B., the fourth installment of said purchase money. And plaintiff says that said E. F. is ready and willing to pay the balance due upon said contract, as soon as a valid deed can be made to him for said premises.

Plaintiff further represents that all the other defendants named are heirs at law of said A. B., deceased.

Plaintiff therefore prays that said heirs at law may be made defendants to this petition, and that said plaintiff may be authorized, upon payment of the residue of said purchase money, to execute and deliver to said E. F., in behalf of the aforesaid heirs at law of said decedent, a deed in fee simple for the real estate hereinbefore described.

C—— D——, *Administrator,*

[*or, H. G., Att'y for plaintiff.*]

State of Ohio, — county, ss.

C. D., the plaintiff named [*and conclude in all respects as in Form 66*]

—o—

116.

Notice to parties by publication, and proof of the same.

(Pages 186, 187, 207.)

LEGAL NOTICE.

A. V., who resides at —, in — county, Iowa [*add, if so:*] U. V., whose place of residence is unknown, [*also add, if so:*] and the unknown heirs of R. B., deceased, one of the heirs at law of A. B., deceased, will take notice that on the — day of —, A. D. 18—, C. D., executor of the last will and testament [*or, administrator of the estate*] of A. B., deceased, filed in the probate court [*or, court of common pleas*] within and for the county of —, and State of Ohio, a petition, alleging that [*then briefly set forth the facts contained in the foregoing form, as for instance:*] on the — day of —, 18—, the said A. B., then in full life, entered into a contract in writing with E. F., for the sale of the following described real estate, situate in said county, to wit: [*describe*

the property], upon the following terms: [*state the terms*]. That said E. F. paid to said A. B., in his lifetime, the first, second, and third installments, and to said C. D., after the death of said A. B., the fourth installment of said purchase money. That said E. F. is ready and willing to pay the balance due upon said contract, so soon as a valid deed can be made to him for said premises; and that G. H., I. K., S. T., U. V., A. V., L. B., M. B., N. B., and said unknown heir are the heirs at law of said decedent, A. B.

The prayer of the petition is for authority to make a deed to said L. R., in behalf of said heirs at law, upon payment of the residue of said purchase money.

The persons first above mentioned will further take notice that they have been made parties defendant to said petition, and that they are required to answer the same on or before the — day of —, A. D. 18—.

— —, 18—.

C— D—,

Executor [or, administrator] of A. B., deceased.

The proof of the above publication must be made in all respects as directed in Form 71.

—0—

117.

Executor or administrator ordered to make deed.

(Page 207.)

C. D., executor [or, administrator] of	} Petition to complete contract.
A. B., deceased,	
vs.	
E. B. and others.	

If there are minor defendants, first enter the appointment of a guardian *ad litem*—Form No. 75.

The said defendants having been all legally notified of the pendency of said petition, this cause now comes on for hearing upon said petition, the answer of the guardian *ad litem*, and the testimony. And the court being fully advised in the premises, finds that said A. B., on the — day of — A. D. 18—, being then in full life, entered into a contract in writing with L. R. for the sale of the premises in the petition described. That said L. R. paid the first, second, and third installments of the purchase money to said A. B., before his decease, and has since paid to the petitioner the fourth installment of the same; and that said L. R. is ready and willing to comply with so much of said contract as remains unfulfilled by him, so soon as a valid deed for said premises can be made to him. It is therefore ordered, that upon pay

ment of the residue of said purchase money, said C. D., executor of the last will and testament [*or*, administrator of the estate] of said A. B., deceased, for and on behalf of the heirs at law of said decedent, execute and deliver to said L. R. a deed in fee simple for said premises, according to the statute in such case made and provided.

—o—

118.

Deed of executor or administrator in preceding case.

(Page 207.)

Know all men by these presents, that, whereas, on the — day of —, A. D. 18—, C. D., executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased, filed his petition in the probate court within and for the county of —, and State of Ohio, against E. B., etc., heirs at law of said decedent, for authority to make a deed to L. R., on behalf of the heirs at law of said decedent, for the following described real estate, situate in said county of —, and State of Ohio, to wit: [*describe the property.*], in compliance with the terms of a contract in writing entered into on the — day of —, A. D. 18—, between the said A. B., then in full life, and said L. R. And whereas, such proceedings were had that the said C. D. was ordered by said court, as executor [*or*, administrator] as aforesaid, and for and on behalf of the heirs of said decedent, to execute and deliver to the said L. R. a deed in fee simple for said premises, upon payment of the purchase money remaining unpaid, which order is in words as follows, to wit: [*here copy the order in full, inclosing it in quotation marks*], all of which will more fully appear by the records of said court, to which reference is here made: and the said L. R. having paid the residue of said purchase money; now, therefore, I, the said C. D., executor of the last will and testament [*or*, administrator of the estate] of said A. B., deceased, by virtue of the powers in me vested by law and the order of said court, for and on behalf of the heirs at law of said decedent, do hereby give, grant, bargain, sell, and convey unto the said L. R. the premises hereinbefore described, with all and singular the appurtenances. To have and to hold the same unto him, the said L. R., and unto his heirs and assigns forever.

In testimony whereof, I, as executor [or, administrator] as aforesaid, hereunto set my hand and seal, this — day of —, A. D. 18—.

C—— D——, [L. S.]

Executor [or, administrator] of A. B., deceased

Executed in presence of

I,—— S——,

C—— P——.

For acknowledgement, see Form 87.

—O—

119.

Petition for extension of time for making sale of personal property, or for permission to sell the same at private sale.

(Pages 82, 99.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

The undersigned, executor of the last will and testament [or, administrator of the estate] of A. B., deceased, respectfully asks for an order * extending the time for making sale of said decedent's personal property, subject to sale, from the three months specified by statute, to — months, for the following reasons:

1st.

2d.

etc.

C—— D——,

Executor [or, administrator] as aforesaid.

*If an order to sell at private sale is desired, proceed as above to the *, and then add: authorizing him to sell, at private sale †, the following articles, they being subject to sale, to wit: [Here enumerate the articles, or otherwise clearly designate them.]*

Said authority is asked for the following reasons: [Give reasons.]

C—— D——,

Executor [or, administrator] as aforesaid.

If authority to sell at private sale for less than the appraised value is deemed necessary, follow the form last given, but insert at the † these words: at prices less than their appraised value, if said appraised value can not be obtained [and conclude as above].

Though not usually done, the probate judge may require the following affidavit to be made to the foregoing motion:

The State of Ohio, — county, ss.

C. D., being duly sworn, says that the various matters and things contained in the foregoing motion are true, as he verily believes.

C—— D——.

Sworn to and subscribed before me, this — day of —, A. D. 18—,
 G — — W — —,
Probate judge.

—O—

120.

Affidavit to obtain authority to sell at less than appraised value.

(Pages 83, 99.)

The State of Ohio, — county, ss.

E. F., being duly sworn, says that * he has read [*or, has heard read; or, that he knows the facts set forth in*] the petition to which this affidavit is annexed; that he has no interest whatever in the matters therein referred to; that said property [*or, debts, etc.*] mentioned in said petition can not be sold at its [*or, their*] appraised value, and that it will be for the best interest of the estate of the said A. B. to sell said articles at prices less than their appraised value, as he verily believes.

C — — D — —.

Sworn [*or, affirmed*] to and subscribed before me, this — day of —, A. D. 18—.

N — — E — —,

Notary public, — county, Ohio.

At least three affidavits similar to the above must be annexed to the petition, or these may be combined into one, in form as follows :

Another form.

State of Ohio, — county, ss.

E. F., G. H., I. K., and L. M., being duly sworn, each for himself says that [*and continue from the * exactly as above to the signatures. Each affiant must then sign his name as follows :*]

E — — F — —,

G — — H — —,

I — — K — —,

L — — M — —.

Sworn [*or, affirmed*] to and subscribed before me, this — day of —, A. D. 18—.

M — — E — —,

Notary public, — county, Ohio.

—O—

121.

Allowance of the further time, or authority, asked for in the preceding motion.

(Pages 82, 83, 99.)

On motion and affidavit [*or, affidavits*] filed, and for good cause shown, C. D., executor of the last will and testament [*or, administrator of the estate*] of A. B., deceased, is * allowed — months in addition to the three months usually allowed by statute, in which to sell the personal property of said decedent subject to sale.

[*Or this:*]

On motion [*follow the above to the *, and then add:*] authorized to sell, at private sale, the personal property designated in said motion.

[*And, if so, also add:*] And it further appearing by said motion and by the affidavits of *four* disinterested persons, that said property can not be sold for its appraised value, and that it would be for the best interest of said estate to sell the same at a less price, it is also ordered that said property may be sold for the highest price that can be obtained therefor, regardless of its appraised value.

—O—

122.

Bond of foreign executor or administrator.

(Page 211.)

Know all men by these presents, that we, C. D., S. H., and P. L., are held and firmly bound unto the State of Ohio in the sum of — dollars, to the payment of which we hereby jointly and severally bind ourselves, our heirs, executors, and administrators, if default be made in the condition following:

Whereas, in a certain case pending in the probate court of the county of —, and State of Ohio, wherein the said C. D., as executor of the last will and testament [*or, administrator of the estate*] of A. B., deceased, is petitioner, and Y. B. and others are defendants, the said executor [*or, administrator*] has been ordered by said court to sell certain real estate of said decedent, to pay his debts and legacies, and the charges of administering his estate: Now, if the said C. D. shall account and dispose of the proceeds of such sale in payment of the debts and legacies of said decedent, and the charges aforesaid, ac-

according to the laws of the state of [*the state in which he was appointed*], then this obligation to be void: otherwise to be and remain in full force and effect.

Signed and sealed by us, this — day of —, A. D. 18—.

Executed in presence of

C— D—, [L. s.]

S— H—, [L. s.]

P— L—. [L. s.]

—O—

123.

Bond of foreign executor or administrator, when ordered to sell more real estate than necessary to pay debts, etc.

(Page 211.)

(See Form No. 80.)

—O—

124.

Notice to an executor or administrator that a motion will be made to require him to give additional bond.

(Page 56.)

To C. D., executor of the last will and testament [*or, administrator of the estate of A. B., deceased*]:

You are hereby notified that on the — day of —, 18—, a motion will be made in the Probate Court of — county, Ohio, for an order of said court requiring you to give additional bond as executor [*or, administrator*], for the reason that [*here state the reason*].

— —, 18—.

E— B—,

One of the heirs at law of said A. B., deceased.

A copy of the above notice must be served on the executor or administrator named therein, or on each of them, if there be more than one. Proof of service must be made by affidavit of the person or officer who served the notices, which may be as follows, or as given in Form 144.

The State of Ohio, — county, ss.

C. C., being sworn, says that on the — day of —, A. D. 18—, he served the within [*or, above; or, annexed, etc.*] notice upon C. D. and

E. F., in said notice named, by delivering to each of them a true copy thereof.

C—— C——.

Sworn [*or*, affirmed] to and subscribed before me, this —— day of ——, A. D. 18——.

C—— M——,
Probate judge.

——O——

125.

Order of court requiring executor or administrator to give additional bond.

(Page 57.)

It appearing to the court that the sureties in the bond of C. D., as executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased, are insufficient [*or other reason*], said executor [*or*, administrator] is ordered to give additional bond in —— dollars, with sureties to be approved by this court.

——O——

126.

Notice of a surety that he has filed a petition to be released from further liability.

(Page 56.)

To C. D., administrator of the estate of A. B., deceased:

You are hereby notified that on the —— day of ——, 18——, I filed my petition in the probate court of the county of ——, and State of Ohio, praying to be released from future responsibility as one of the sureties upon your bond as executor of the last will and testament [*or*, administrator of the estate] of said A. B., deceased, for the reason that [*here state the reason*].

Said petition will be for hearing on the —— day of ——, 18——, at —— o'clock, forenoon.

——, 18——.

S—— M——.

A copy of this notice must be served upon each of the persons therein named, at least five days before hearing, and proof of service made as in No. 124.

127.

Application of surety to be released from further liability.

(Page 56.)

To the Hon. the Judge of the Probate Court within and for the county of —, and the State of Ohio:

Your petitioner, L. M., respectfully represents that he is one of the sureties of C. D., in a bond dated —, 18—, given by said C. D., as executor of the last will and testament [or, administrator of the estate] of A. B., deceased; that [here state the reason why a discharge is asked for]; and that your petitioner is desirous of being released from his said suretyship.

Your petitioner therefore prays that said C. D. may be required to enter into a new administration bond, according to law, and that your petitioner may be discharged from future responsibility as surety as aforesaid.

L—— M——.

—o—

128.

Order of court discharging surety.

(Page 56.)

L. M. having filed his petition to be discharged from future responsibility as one of the sureties upon the administration bond of C. D., as executor of the last will and testament [or, administrator of the estate] of A. B., deceased, for the reason that [here state the reason alleged in the petition]; and it appearing that notice of the filing, prayer, and time of hearing said petition has been given to the executor [or, administrator], and no good cause being shown why the prayer of said petitioner should not be granted, it is ordered that said L. M. be discharged from further responsibility upon said bond, and that said C. D. give a new bond as such executor [or, administrator], in the sum of — dollars, with sureties to be approved by this court.

—o—

129.

Petition of the sureties of an executor or administrator for a bond of indemnity.

(Page 57.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

Your petitioners, L. M. and N. O. respectfully represent that they are sureties in the administration bond of C. D., as executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased, and that said C. D. is wasting and unfaithfully administering said estate, to the great detriment of the rights and interests of your petitioners.

Your petitioners therefore pray that said C. D. may be compelled to file an account of his administration, and to execute to your petitioners a bond of indemnity, according to law.

L—— M——,
N—— O——.

—O—

130.

Order of court requiring executor or administrator to execute a bond of indemnity to his sureties.

(Page 57.)

On petition of L. M. and N. O., sureties in the administration bond of C. D., executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased, and it appearing to the court that said executor [*or*, administrator] is wasting and unfaithfully administering said estate, it is ordered that said C. D., within — days, file an account of his administration, and also execute a bond of indemnity to said sureties in the sum of — dollars, with sureties to be approved by this court.

—O—

131.

Bond of residuary legatee.

(Pages 46, 63.)

Know all men by these presents, that we, C. B., H. G., and C. C. are held and firmly bound unto the State of Ohio, in the sum of ——— dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators, if default be made in the condition following:

Whereas, by the last will and testament of A. B., deceased, duly admitted to probate, by the probate court within and for the county of ———, and State of Ohio, the said C. B. is made residuary legatee of all the estate, both real and personal [*or, of the personal estate*] of said A. B., deceased: Now, if the said C. B. shall pay all the debts and legacies of the said decedent, together with the charges of administration, and all other legal claims against said estate, then this obligation to be void: otherwise to be and remain in full force and effect.

Signed and sealed by us at ———, this ——— day of ———, A. D. 18—.

Executed in presence of

C——— B———, [L. s.]

H——— G———, [L. s.]

C——— C———. [L. s.]

———O———

132.

Notice to executor or administrator residing out of the state to settle his accounts.

(Page 53.)

To C. D., executor of the last will and testament [*or, administrator of the estate*] of A. B., deceased:

You are hereby notified that unless you render an account of your administration of said estate, to the probate court of ——— county, Ohio, on or before the ——— day of ———, A. D. 18—, a motion will then and there be made to remove you from your said trust, and to appoint a suitable person in your stead.

———, 18—.

C——— B———,

One of the heirs at law of A. B., deceased [*or other party interested*].

Proof of the service of this notice must be made in the same manner as No. 124.

———O———

133.

Citation of executor or administrator residing out of the state, requiring him to settle his account.

(Page 53.)

The State of Ohio, — county, ss.

To C. D., executor of the last will and testament [*or*, administrator of the estate] of A. B., deceased:

You are hereby required to render an account of your administration of the estate of said A. B., deceased, to the probate court of — county, Ohio, before the — day of —, A. D. 18—, or to appear in said court and show cause why you should not be removed from your said trust, and a suitable person appointed in your stead.

Witness my signature and the seal of said probate court, at
[L. S.] —, this — day of —, A. D. 18—.

W—— B——,
Probate judge.

A copy of this writ must be delivered to the executor or administrator, and proof of such delivery must be made by the affidavit (see Form 124) of the person by whom the same was done, or in such other way as the court may direct. The courts will now probably, as a general rule, require citations to be served and returned by the sheriff.

—O—

134.

Petition of widow for increase of allowance.

(Page 69.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

Your petitioner, Y. B., widow of A. B., deceased, respectfully represents that the appraisers of the personal estate of said decedent allowed the sum of — dollars, in property and money for the support of your petitioner, and of C. B. and E. B., minor children of said decedent, for one year from the time of his death; that said sum is insufficient for the purpose aforesaid, and that they will require the additional sum of — dollars.

Your petitioner therefore prays that the allowance aforesaid may be increased by said sum of — dollars, and that the executor [*or*, administrator of the estate] of said A. B., deceased, may be directed to pay

the same over to your petitioner, in pursuance of the statute in such case made and provided.

Y—— B——,
Widow of A. B., deceased.

—o—

135.

Petition of creditor for decrease of widow's allowance.

(Page 69.)

To the Hon. the Judge of the Probate Court within and for the county of —, and State of Ohio:

Your petitioner, X. Y., respectfully represents that the appraisers of the personal estate of A. B., deceased, allowed the sum of — for the support of Y. B., widow of said decedent, and of C. B. and E. B., minor children of said decedent, for one year from the time of his death; that said sum is greatly in excess of the amount of money necessary for the support of said widow and minor children for one year, in the style said decedent was accustomed to support them before his death; that said estate is insolvent; that, under the circumstances, the said allowance is unjust and inequitable to the creditors of said A. B.

Wherefore, your petitioner prays that said allowance may be reduced to the sum of \$——, and that the executor [*or*, administrator of the estate] of said A. B. may be directed to apply the difference between said sum of \$—— and the amount of said allowance to the payment of the claims against said estate, in the order prescribed by law.

X—— Y——,
Creditor of said estate.

—o—

136.

Administrator's affidavit that no will exists.

(Page 48.)

State of Ohio, — county, ss.

C. D., who applies to be appointed administrator of the estate of A. B., deceased, being sworn, says that there is not, to his knowledge, any last will and testament of the said alleged intestate, A. B.

C—— D——.

Sworn [*or*, affirmed] to and subscribed before me, this — day of —, A. D. 18—.

W—— B——,
Probate judge.

137.

Revocation of letters upon discovering will.

(Pages 54, 59.)

A last will and testament of A. B. having been found, produced in court, and duly proved and allowed according to law, the letters of administration on the estate of said A. B., heretofore granted to C. D., in the belief that said A. B. had died intestate [*or, because said will could not be found*] are hereby revoked and annulled; and the said C. D. is divested of all power, authority, and control over the estate of said A. B., deceased.

—O—

138.

Requisition on executor or administrator to reject claim.

(Page 111.)

To C. D., executor of the last will and testament [*or, administrator of the estate*] of A. B., deceased;

SIR:—Take notice that I, E. F., an heir [*or, creditor*] of said decedent [*or, I, E. F., who have purchased from G. H., an heir of said decedent, certain property inherited by said heir from said decedent*], do hereby require you to reject and disallow a certain claim of \$875 for professional services as physician, claimed to have been rendered by R. S. to said A. B. during his last sickness [*or otherwise describe the claim*], said claim having been, as I am informed, presented to you by the said R. S. for allowance against said estate.

Dated ———, 18—.

E———— F————,

—O—

139.

Bond to pay costs of contesting claim above mentioned.

(Page 112.)

Know all men by these presents that we, E. F., G. F., and O. P., are held and firmly bound unto C. D., executor of the last will and testament [*or, administrator of the estate*] of A. B., deceased, and unto his successors in the administration, for the benefit of the estate of said A. B., deceased, in the sum of ——— dollars [*double the probable amount of*

all costs and expenses of contesting claims in the various courts], to the payment of which we hereby jointly and severally bind ourselves, our heirs, executors, and administrators, if default be made in the condition following :

Whereas, R. S. has presented unto the said C. D., executor [*or, administrator de bonis non, etc., as may be*], for allowance against the estate of the said A. B., a certain claim of \$—— for —— [*or otherwise describe the claim, as in the above requisition*].

And whereas, the said E. F. has filed in the probate court of —— county, Ohio, a written requisition on said C. D., executor [*or, administrator*] to disallow and reject said claim : Now, therefore, if the said E. F. shall pay all costs and expenses of contesting said claim, in case judgment therefor shall be finally obtained against said C. D., executor, or his succeſſeor or ſucceſſors, then theſe preſents ſhall be void : otherwiſe to be in full force and effect.

Signed and ſealed by us on this —— day of ——, A. D. 18——.

Executed in preſence of

E—— F——, [L. s.]

G—— F——, [L. s.]

D—— P——. [L. s.]

—o—

140.

Notice to executor, etc., that requisition has been filed.

(Page 112.)

To C. D., executor of the laſt will and teſtament [*or, administrator of the eſtate*] of A. B., deceased :

You are hereby notified that E. F., on the —— day of ——, 18——, filed in this, the probate court of —— county, a written requisition on you, as ſuch executor [*or, administrator, etc.*], to diſallow and reject a certain claim, it being repreſented in ſaid requisition that ſaid claim is of \$——, for ——, and that ſaid claim has been preſented to you by R. S. for allowance to him by you againſt the eſtate of A. B., deceased.

The ſaid E. F. alſo, on the ſame day, filed in this court a bond conditioned to pay all coſts and expenſes of conteſting ſaid claim, in caſe it be finally allowed.

—— —, 18——.

I—— D——,

Probate judge

—o—

141.

Notice to claimant that claim is rejected.

(Page 112.)

To R. S. :

SIR:—You are hereby notified that the claim of \$—, for — here-
tofore presented by you to me as executor of the last will and testa-
ment of A. B., deceased, for allowance against the estate of said A. B.,
and allowed [*or, taken into consideration for allowance, etc., as may be*]
by me, is disallowed and rejected by me, because of a certain requis-
ition and bond filed in the probate court of — county, by E. F.
on the — day of —, 18—.

— —, 18—.

C — D —,

Executor [or, administrator] as aforesaid.

— o —

142.

Order of court concerning executor's claims ; journal entry.

(Page 113.)

C. D., executor of the last will and testament [*or, administrator of*
the estate] of A. B., deceased, having, on the — day of —, 18—,
presented to the court for allowance to him against the estate of said
A. B., a certain claim amounting to — dollars, for a horse sold and
delivered by said C. D. to said A. B., during his lifetime, it is ordered
by the court that the testimony concerning said claim shall be heard
on the — day of —, A. D. 18— [*not less than four nor more than six*
weeks from day of presenting claim], and an order is this day issued to
said executor [*or, administrator*] in the language as follows : [*Here copy*
the following order].

— o —

143.

Order directed to the executor.

(Page 113.)

To C. D., executor of the last will and testament [*or, administrator of*
the estate] of A. B., deceased :

You are hereby ordered to give notice in writing to all the heirs, leg

atees, and devises of said decedent, who are interested in his estate, and to C. S. and M. S., creditors of said estate, that you have, on the — day of —, 18—, presented to this court for allowance to you against said estate a certain claim, which claim you shall describe in said notice; and that the day fixed for hearing the testimony touching said claim is the — day of —, 18—.

You shall serve a copy of said notice on each of said parties at least twenty days before said day of hearing, or by publication according to law on such as are non-residents of this county.

J—— B——,

Probate judge.

—o—

144.

Notice of executor or administrator to heirs, etc., concerning his claim.

(Pages 113, 114.)

To ———:

You will take notice that I have presented to the probate court of — county, Ohio, for allowance to me against the estate of A. B., late of said county, deceased, a certain claim of \$150.00, for a horse sold and delivered by me to said A. B., during his lifetime, at his request [*or otherwise describe the claim, as may be*], and that said court has fixed the time for hearing the testimony touching said claim on the — day of —, A. D. 18—.

C—— D——,

Executor [or, administrator] of said A. B.

———, 18—.

A copy of the above notice must be served upon each of the persons designated by the order of the court commanding such notice, at least twenty days before the time of hearing. Proof of service may be made to the court by the affidavit of the person or officer serving the notice. This affidavit may be as follows: (See references to statutes, Form 124.)

The State of Ohio, — county, ss.

C. D., being duly sworn, says that he served the above [*or, within; or, annexed*] notice upon S. B. and M. B., on the — day of —, 18—, and upon X. Y. on the — day of —, 18— [*etc., specifying the persons served, and the day of service on them*], by delivering to each a true copy thereof.

C—— D——.

Sworn [*or, affirmed*] to and subscribed by said C. D., before me, this — day of —, 18—.

W—— B——,

Probate judge [or, justice of the peace, etc.]

—o—

145.

Foregoing notice, when served by publication.

(Page 113.)

S. B., C. B., and N. S., residents of — county, Ohio, and R. S., a resident of — county, Indiana, interested in the estate of A. B., deceased, late of — county, Ohio, as heirs or otherwise, will take notice that I have presented to the probate court of — county, Ohio, for allowance to me against the said estate, a certain claim of \$150.00 for a horse sold and delivered by me to said decedent during his lifetime, at his request, and that the testimony concerning said claim will be heard by said court on the — day of —, 18—.

C — D —,

Executor [or, administrator] of said A. B.

Dated — —, 18—.

— o —

146.

Bond of appellant in proceedings on executor's or administrator's claim.

(Page 115.)

Know all men by these presents, that we, X. Y., E. E., and G. H., are held and firmly bound unto the State of Ohio, for the use of [*here name the persons interested in the judgment appealed from*], in the penal sum of [*here name a sum at least double the probable costs of the proceedings to be had in consequence of said appeal*]; to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators, if default be made in the condition following:

Whereas, C. D. executor of the last will and testament [*or, administrator of the estate*] of A. B., late of — county, deceased, did, on or about the — day of —, A. D. 18—, present to the probate court of said county for allowance in favor of said C. D., against the estate of said A. B., a certain claim of — dollars, for —; and,

Whereas, said court heard the testimony touching said claim on the — day of —, A. D. 18—; and, thereupon, did, on the same day [*or, on the — day of —, A. D. 18—, as may be*], allow said claim against said estate, from which decision the said C. D. [*or, X. Y.*] has appealed to the court of common pleas of said county of —.

Now, if the said X. Y. shall pay all costs that may be awarded against him in said court of common pleas, in the proceedings therein

to be had concerning said claim, then this obligation to be void: otherwise to be and remain in full force and effect.

Signed and sealed by us, this — day of —, A. D. 18—.

Executed in presence of

X—— Y——, [L. S.]

E—— F——, [L. S.]

G—— H——, [L. S.]

—o—

147.

Affidavit of proposed bondsman.

(Pages 46, 48, 50, 51, 55, 112, 124, 147, 211.)

State of Ohio, — county, ss.

B. S., one of the sureties on the bond of C. D., administrator of the estate [*or, executor of the last will and testament; or otherwise, as may be*] of A. B. deceased, being duly sworn, says that he is a resident of — county, Ohio; that he is worth, beyond the amount of all his debts, at least — dollars; and that he has real estate, liable to execution in the State of Ohio, amounting in actual value at least to the sum of — dollars, beyond the amount of all his debts and liabilities, and exemptions.

B—— S——.

Sworn to before me, and subscribed in my presence, this — day of —, 18—.

W—— P——,

Probate judge.

NOTE.—“A court or an officer, authorized by law to approve a surety, may require such person to testify, orally or in writing, touching his sufficiency; but this shall not, in itself, exonerate the officer in an action for taking insufficient surety.”^a

“Sureties must be residents of this state, and worth, in the aggregate, double the sum to be secured, beyond the amount of their debts, and have property liable to execution in this state equal to the sum to be secured.”^b

It should be the rule in every court to require from each proposed surety, a written affidavit, similar to the above, to be filed with the bond in the court taking the same, and this rule should be observed in every instance. The law specifies (see pages referred to at head of the foregoing form) that the bond of executors, etc., shall be “with two or more sureties,” in such amounts, etc., as shall satisfy the court. The above provisions specify the *least* qualifications that will satisfy the law. The judge may require something more; and, in view of the ease with which *personal* property may be disposed of, removed from the state, or effectually concealed, and of the difficulty of pursuing *real* property outside of the county of the court, the following rule, adopted by the Probate Court of Hamilton county, is not unreasonable:

“By order of court.—On all bonds taken in this court, there shall not be less than two sureties who must be residents of this county; and such sureties on each bond must, in the aggregate, own real estate in this county worth double the amount of the bond, beyond their debts, and have real estate in this county liable to execution, equal to the amount stated in the bond.” Journal 65. p. 162.

148.

Consent that notes, etc., may be distributed in kind.

(Page 127.)

C. D., executor of the last will and testament [or, administrator of the estate] of A. B., deceased, having represented to us that all the debts of said decedent are paid, and that he still holds certain notes, bonds, etc., to wit: [*briefly describe them*] in his hands undisposed of, and to the proceeds of which we are entitled, we hereby consent to the distribution of the same, or of any part thereof in kind, to such persons as are willing to take the same,

A—— N——,
 B—— M——,
 L—— S——,
 etc., etc.

—O—

149.

Receipt for note, etc., paid out as above assented to.

(Page 128.)

Received of C. D., executor of the last will and testament of A. B., a certain promissory note for \$——, dated ——, payable to the order of ——, in —— after date, signed by ——, and now amounting to sixty-five dollars and twenty cents, and accepted as distribution to me in lieu of the last-named amount of money.

——, 18—.

A—— W——

—O—

150.

Additional bond of administrator de bonis non who sells real estate to pay debts.

(Page 131.)

Same as Form No. 80, except that C. D. must be designated as "*administrator de bonis non* of the estate of A. B., deceased," instead of "*administrator*."

—O—

151.

Application for appointment of guardian ad litem.

(Page 139.)

CASE No. —.

C. D., administrator of the estate of	} — county, Ohio, ss., Probate Court.
A B., deceased, plaintiff,	
vs.	
E. F. and others, defendants.	} Application for appointment of guardian <i>ad litem</i> .

The said L. B., a minor defendant, over fourteen years of age [*or*, C. D., plaintiff; *or*, S. C., a friend of said L. B.], hereby applies for the appointment of a guardian *ad litem* for the said L. B. in this cause, and that H. M. be appointed said guardian.

— — —, A. D. 18—.

L— B—,
[*or*, C. D.; *or*, S. C.]

—o—

152.

Answer of guardian ad litem.

(Pages 139, 140.)

CASE No. —.

C. D., administrator of the estate	} —county, Ohio, ss., Probate Court.
of A. B., deceased, plaintiff,	
vs.	
E. F. and others, defendants.	} Answer of minor defendants.

And now come the said L. B., M. B., and N. B., the minor defendants to the petition in said cause, by H. M., their guardian *ad litem*, heretofore appointed in said cause by said court, and, for answer to said petition, deny all the material allegations therein contained, prejudicial to said minor defendants; and further say, that they are of tender years, and not acquainted with the law in such cases. They therefore pray the court to protect their rights in this case, and for such relief as may be just.

L— B—,
M— B—,
N— B—.

By H— M—,
Guardian ad litem.

The answer of a guardian *ad litem* need not be verified on oath.^a

(a) 5103. See note 1, p. 277, Giaugue's Manual for Guardians.

153.

Answer of decedent's widow, waiving dower in land, and asking for its value in money.

(Page 142.)

CASE No. —.

C. D., administrator of the estate of A. B., deceased, plaintiff, <i>vs.</i> E. F. and others, defendants.	}	— county, Ohio, <i>ss.</i> , Probate Court. Answer of decedent's widow.
---	---	--

The said Y. B., widow of said A. B., deceased (by A. D., her guardian, *if so*), hereby consents to the sale of the said premises prayed for in plaintiff's petition in this cause, and waives the assignment of dower in said premises to her by metes and bounds, or in rents and profits, and asks the court to allow her, in lieu of said dower, such sum of money, out of the proceeds of such sale, as the court may deem to be the reasonable value of her dower interest in said premises.

Y—— B——. (Widow's own signature.)

(*or*, Y—— B——,

By A—— G——, her attorney.)

(*or*, Y—— B——,

By A—— D——, her guardian.)

State of Ohio, — county, *ss.*

Y. B., being duly sworn, says that she is the widow mentioned in the foregoing answer, and that the several matters and things set forth in said answer are true.

Y—— B——,

[*or*, A—— D——.]

Sworn (*or*, affirmed) to and subscribed before me, this — day of — A. D. 18—.

Probate judge,

[*or*, other competent officer.]

The foregoing answer, when made by the guardian, need not be verified on oath.

154.

Entry of approval of foregoing answer, the widow being insane or imbecile.

(Page 142.)

C. D., administrator of the estate of A. B., deceased, plaintiff, vs.	} Petition for sale of real estate.
E. F. and others, defendants.	

It appearing to the satisfaction of the court that the said Y. B., widow of A. B., deceased, is insane [*or, imbecile*], and that it is for her interest that said premises be sold free from her dower, the filing of her answer, in her behalf, by A. D., her guardian, is hereby approved.

—o—

155.

Affidavit as to how private sale was made.

(Page 151.)

The State of Ohio, — county, ss.

C. D., being duly sworn [*or, affirmed*], says that the private sale of property, made by order of court, as represented in the report to which this is attached, was made after diligent endeavor to obtain the best price for the property, and that the sale reported is for the highest price that he could get for said property.

C ——— D ———.

Sworn [*or, affirmed*] to and subscribed before me, this — day of —, A. D. 18—.

G ——— R ———,

Probate judge.

This affidavit should be attached to the report of sale made to the court. See Form No. 85.

156.

Executor's or administrator's written statement of the assets, indebtedness, etc., of the estate, in case of partition suit.

(Pages 114, 153.)

CASE No. —.

C. D., administrator of the estate of A. B. deceased, plaintiff, vs. E. F. and others, defendants,	}	— county, Ohio, ss., Probate Court. Statement of assets, debts, and expenses of said estate.
---	---	---

Now comes the said C. D. [by C. H., his attorney, if so], and states that the assets, indebtedness, and expenses of said estate are respectively as follows:

ASSETS.

Cash on hand.....	\$ ———
Promissory notes, from which will probably be realized.....	\$ ———
(Etc., etc.)	
Total.....	\$560 30

DEBTS AND EXPENSES.

Expenses of last sickness and funeral.....	\$ ———
Widow's allowance.....	\$ ———
Promissory note due to X. Y.....	\$ ———
(Etc., etc.)	
Total.....	\$2755 00
	560 30

(Probable) excess of indebtedness and expenses over assets...\$2194 00

Said plaintiff therefore respectfully asks the court for a certificate of the amount necessary to pay said indebtedness and expenses in addition to said assets, so that the said plaintiff may present the same to the — court, where proceedings in partition of the lands of said decedent are [or, have been] pending.

157.

Certificate above referred to.

(Page 153.)

C. D., administrator of the estate of A. B., deceased, plaintiff, <i>vs.</i> E. F. et al., defendants.	}	— county. Ohio, ss., Probate Court. Certificate of amount necessary to pay decedent's debts.
---	---	---

State of Ohio, — county, ss.

I, — — —, sole judge and *ex-officio* clerk of the probate court within and for the county aforesaid, do hereby certify that I have ascertained from — — — a statement of the assets, indebtedness, and expenses of the said estate, made and presented by said administrator to this court, and from other sources; that the sum of —, in addition to said assets, will be necessary to pay said indebtedness and expenses.

In testimony whereof, I have hereunto set my hand and af-
[L. s.] fixed the seal of the said court at Cincinnati, this — day
of —, A. D. 18—.

Probate judge and ex-officio clerk.

—O—

158.

Executors or administrator's notice to commissioners of insolvent estate that an appeal will be taken.

(Page 186.)

To J. R., R. S., and E. R., commissioners of the insolvent estate of A. B., deceased :

You are hereby notified that I, as administrator of the estate [or, executor of the last will] of said A. B., deceased, intend to appeal to the [here name the court to which appeal is made], from your decision rendered on the — day of —, 18—, allowing, as valid claim against said estate, the claim of X. Y. for \$—, for [and here further describe the claim as may be necessary to clearly identify it.]

C— D—,

Administrator [or, executor] as aforesaid.

—O—

159.

Attested account to obtain a mechanic's lien on a house or other structure, the decedent having been a head-contractor.

(Page 223.)

[Prepare an account of the items of work, materials, or machinery furnished by the decedent, giving dates, prices, etc., obtaining information from account book of decedent, or other reliable sources; and if any credits or set-offs exist against the account, enter them upon the account also. *Special care should be taken to state in the account the date when the first item of labor was done or materials were furnished, as the lien attaches upon whatever interest the owner then had, or afterward acquired, in the property; and to state the date of the last item of work done or materials furnished, as the account must be filed within four months after this last date. The items of this account may be given as suggested below, or as in Form 160, omitting all items after the words, "total cost of improvement." The affidavit may then be written below the account, on the same piece of paper, or may be on a separate piece of paper, and attached to the account.]*

Account of materials furnished by A. B., deceased, to E. F. for repairing his dwelling-house on — street, in the village of —, — county, Ohio.

April 3, 1878.	2,000 ft. weather-boarding, at \$17.00 per 1,000 ft.....	\$34 00	
" 3, "	20,000 shingles, at \$3.75 per 1,000.....	75 00	
" 3, "	1,000 ft. scaffolding, at \$16.00 per 1000 ft.....	16 00	
" 3, "	2 kegs nails, at \$3.00 per keg.....	6 00	
May 1, "	3,000 ft. weather-boarding, at \$17.00 per 1,000 ft.....	51 00	
" 1, "	1,000 shingles, at \$3.75 per 1,000.....	3 75	
" 1, "	1,500 ft. flooring, at \$3.00 per hundred ft.....	45 00	
" 2, "	1,500 ft. joist, board measure, at 2 cts. per foot.....	30 00	
" 6, "	150 ft. studding, board measure, at 2 cts. per foot.....	3 00	
" 8, "	800 ft. plank, board measure, at 2 cts. per foot.....	16 00	
" 10, "	200 ft. joist, board measure, at 2 cts. per ft.....	4 00	
			\$283 75
CREDITS ON THE ABOVE.			
July 6, 1878.	By cash.....	25 00	
" 19, "	By cash.....	10 00	
Sept. 7, "	By cash.....	10 00	
Total credits.....			45 00
Remaining due.....			238 75

The State of Ohio, — county, ss.

C. D., being sworn, says that he is executor of the last will and testament [or, administrator of the estate] of A. B., deceased; that, to the best of his knowledge and belief, the foregoing account [or, the account hereto attached, marked "Exhibit A"] is in all respects a correct account of labor done [or, materials, or, machinery furnished; or, of the labor done and materials furnished, etc., as may be] by the said A. B. during his life, to and for the said —;

that there are no credits or set-offs against said account, except those set forth therein; that there remains due to the estate of said A. B. thereon, and unpaid, the sum of — dollars and — cents, as in said account set forth; that said labor was done [or, said materials were furnished, *etc.*] under and by virtue of a verbal contract [or, a written contract, a true copy of which is hereto attached, marked "Exhibit B"] between said A. B. and said — [If the contract was verbal, and any amounts or times of payments were specified therein, here state that the amounts and times of payments to be made under such verbal contract were as follows: and here state the amounts and times of payments, as specified in the contract; or, if so, that no amounts nor times of payment were specified in said contract]; that said labor was done [and materials furnished, *etc.*, as may be] for constructing [or, altering, repairing, *etc.*] a certain dwelling-house [or other structure according to the facts], standing on a lot [or, lots, or, tract] of land described as follows: [Here describe the land; as, for instance, lot, or, the east half of lot, *etc.*, number —, in the village of —, in — county, and State of Ohio, as shown on the plat of said village, recorded in plat book No. —, page —, of the records of said county; or describe by giving section, township, range, *etc.*; or in any other way that may clearly designate the land]. (See description in form 160).

Affiant further says that he, as executor [or, administrator] aforesaid, is the rightful owner of said claim, and that he asserts a lien on said premises to secure said claim.

C — D —.

Sworn [or, affirmed] to and subscribed before me, this — day of —, A. D. 18—.

C — H —,

Justice of the peace.

—o—

160.

Attested account to obtain a mechanic's lien on lands abutting on road, sidewalk, drain, sewer, etc., the decedent having been a head-contractor.

(Page 224.)

[Prepare an account as directed in the preceding form. But the account in this case must contain, in addition, an estimate per front foot of the value of the labor done or materials furnished, or both, along the line of the street, *etc.*, when the contract is made with several owners; and the number of front feet abutting on the lines of such owners as fail to pay must be stated in the account. But if that part of the road *etc.*, affected by said labor or materials abut upon the lot or farm of one owner only, between whom and the decedent the contract was made, then the number of front feet and the estimate per foot need not be given. If there be more than one owner, the number of front feet owned by those who have

paid in full need not be given. It must be remembered that if the improvement is to be paid by the property on *both* sides of the road or street the number of front feet will then be twice as great as the length of the improvement.

Suppose, for instance, that G. H., owning 60 feet front on a certain street, and J. K., owning 40 feet adjoining, and that on the other side, and opposite, L. M. owned 50 feet, N. O. 25 feet, and P. Q. 25 feet, and that these five had employed A. B., during his life, to construct a sewer in front of their property, which he had done, and that G. H. and N. O. had paid in full, and L. M. in part. The account could then be made out as follows:]

Account of labor done and materials furnished for constructing a sewer abutting on the lots situate on each side of W. street, 100 feet next west of Y. street, in the town of —, in — county, Ohio.

June 3 to 9, 1878.	30 days' labor excavating, by 5 men, at \$1.25 per day.	\$37 50	
" 9 " 13, "	20 days' labor excavating, by 4 men, at \$1.25 per day.	25 00	
" 15, "	50 bushels lime, at 15 cts. per bu.	7 50	
" 15, "	10 loads sand, at 50 cts. per load.	5 00	
" 15, "	10,000 brick, at \$7.50 per 1,000.	75 00	
" 18, "	20 loads limestone rock, at \$1.20 per load.	24 00	
" 18 to 23, "	10 days' labor bricklaying, by 2 men, at \$2.00 per day.	20 00	
July 1 " 7, "	12 days' labor refilling trench, by 2 men, at \$1.25 per day.	15 00	
" 24, "	6 days' labor, 2 men and teams, removing earth, etc., at \$3.50 per day for 1 man and team.	21 60	
	Total cost of improvement.		\$230 00
	Total length of improvement.	200 feet.	
	Value of said labor and materials, per front foot of said abutting land.	\$1.15	
RELATING TO J. K.			
July 24, 1878.	No. of said front feet owned by J. K.,	40	
	Total due on said labor and materials for J. K.		46 00
	Credits and set-offs on J. K.'s acc't, none.		
RELATING TO P. Q.			
July 24, 1878.	No. of said front feet owned by P. Q.,	25	
	Total due on said labor and materials for P. Q.		28 75
	Credits and set-offs on P. Q.'s acc't, none.		
RELATING TO L. M.			
July 24, 1878.	No. of said front feet owned by L. M.,	50	
	Total due on said labor and materials for L. M.		57 50
	Credits and set-offs on L. M.'s acc't.		
Sept. 3, 1878.	By cash.	25 00	
Oct. 3, 1878.	By bill of goods purchased.	7 50	
	Total sets-offs and credits, on L. M.'s account.		32 50
	Balance due from L. M.		25 00

State of Ohio, — county, ss.

C. D., being sworn, says that he is executor of the last will and tes-

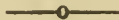
tament [*or, administrator of the estate*] of A. B., deceased; that, to the best of his knowledge and belief, the foregoing account [*or, the account hereto attached, marked "Exhibit A"*] is in all respects a correct account of the labor done and materials furnished by the said A. B. during his life, to and for the said J. K., P. Q., L. M., and others, that there are no credits or set-offs against said account except those set forth therein; that there remains due to the estate of said A. B. there on, and unpaid, the sum of ninety-nine dollars and seventy-five cents, as in said account mentioned; that said labor was done, and said materials were furnished by virtue of a verbal contract [*if the contract was a written one, follow directions given in Form 159*] between the said A. B. and the said J. K., P. Q., and L. M.; that the amount of payment for said labor and materials was not specified in said contract, and that the time of payment was to be as soon as the job should be completed [*or otherwise, according to the facts. See Form 159*]; that said labor was performed and said materials were furnished for constructing a sewer abutting on the lots of land, bounded and described as follows: A part of lot No. —, in the town of —, in — county, Ohio, fronting on the north side of W. street, beginning at a point on the north line of said W. street, sixty (60) feet west of the northwest corner of said W. street and Y. street; thence extending westwardly along said north line, forty (40) feet to a point, and from these two points extending northwardly at right angles to said north line, one hundred and fifty (150) feet to an alley. [*And similarly, or in some other way that will clearly designate them, describe the lots of P. Q. and of L. M. See description in Form 159.*]

Affiant further says that he, as executor [*or, administrator*] aforesaid, is the rightful owner of said claim, and that he asserts a lien on said premises of J. K., P. Q., and L. M. to secure said claim.

C ——— D ———.

Sworn (*or, affirmed*) to and subscribed before me this — day of —, A. D. 18—.

C ——— H ———,
Justice of the peace.



161.

Attested account of labor done or materials furnished, or both, by a deceased sub-contractor, material-man, laborer, etc., on a house or other structure.

(Pages 227, 228.)

[Prepare an account of the items of work, materials, or machinery furnished by the decedent, giving dates, prices, etc., obtaining information from account book of decedent, or other reliable sources; and if any credits or set-offs exist against the account, enter them upon the account also. The account given in Form 159, and the account given in Form 160 as far as to words "total length of improvement," may serve to indicate how the account should be prepared in this case. The following affidavit may then be written below the account, on the same piece of paper, or may be on a separate piece of paper, and attached to the account. Such an attested account should be filed with each of the owners.]

The State of Ohio, — county, ss.

C. D., being sworn, says that he is executor of the last will and testament [or, administrator of the estate] of A. B., deceased; that, to the best of his knowledge and belief, the foregoing account [or, the account hereto attached, marked "Exhibit A"] is in all respects a correct account of labor done [or, materials, or, machinery furnished, or, of the labor done and materials furnished, etc., as may be] by the said A. B., as a sub-contractor [or, as a material-man, or, laborer, etc.], during his life, to and for P. S., who was head-contractor [or, to T. L., who was a sub-contractor under P. S., the head-contractor, or, to A. R.; who was a sub-contractor under T. L., who was a sub-contractor under P. S., the head-contractor, or otherwise set forth the decedent's connection with the owner through the various sub-contractors and head-contractor] employed by X. Y. [or, if there be more owners than one, name all of them] for the construction [or, repair, or, removal, etc., as may be] of a certain * dwelling-house [or, other structure, as may be, and here describe the house, etc., by giving its location or otherwise, with sufficient clearness to leave no doubt in the owner's mind as to what structure is meant, as for instance—situate on the northwest corner of W. and Y. streets, in the town of —, in — county, Ohio, or, three-story brick dwelling-house, now being erected on the north side of W. street, sixty feet west of the northwest corner of W. and Y. streets, in the city of —, in the county of —, and State of Ohio †], under and by virtue of a contract between the said A. B. and the said P. S. [or, A. R., or, T. L., as may be]; that said construction [or, repairing, etc.] was provided for in a contract between said head-contractor and said X. Y. [name all the owners if more than one], the owner [or, owners] of said structure. That there are no credits or set-

The * and the † are referred to in Form 162, and have no other significance.

offs against said account, except those set forth therein; that there remains due to the estate of said A. B. thereon, and unpaid, the sum of — dollars and — cents, as in said account set forth.

Affiant further says that he, as executor [or, administrator] aforesaid, is the rightful owner of said claim, and that he requires said owner [or, owners] to retain from said head-contractor all subsequent payments, as security for the payment of said account.

C—— D——.

Sworn [or, affirmed] to and subscribed before me, this — day of —, A. D. 18—. C—— H——,

Notary public, — county, Ohio [or other authorized officer].

—o—

162.

Attested account of labor done or materials furnished, or both, by a deceased sub-contractor, material-man, laborer, etc., on a road, sidewalk, ditch, etc.

(Pages 227, 228.)

[Prepare the account exactly as in Form 161, except that the part from the * to the † should be changed to read as follows]:

*road [or, sewer, or, sidewalk, etc., as may be] abutting on [and here describe the land or lots on which the road, sewer, etc., abuts, with sufficient clearness to leave no doubt in the minds of the various owners as to what road, ditch, etc., is meant. Such descriptions as given in Forms 159, 160, or 161 would be sufficient.]

—o—

163.

Notice to owner that a mechanic's lien is in existence.

(Page 227.)

To ————:

You are hereby notified that on the — day of —, 18—, I, as executor of the last will and testament [or, administrator of the estate] of A. B., deceased, took a mechanic's lien on [here describe the property subjected to the lien], to secure the claim of said decedent, amounting to \$—, for work and labor done on [or, for materials furnished for] said

dwelling-house [or, store; or, road, etc.] by said A. B. during his life, and that said lien is now in existence and unsatisfied.

C—— D——,

Executor [or, administrator] as aforesaid.

——, 18—.

—O—

164.

Notice to lienholder to commence suit.

(Page 227.)

To —— :

You are hereby notified that I, as executor of the last will and testament [or, administrator of the estate] of A. B., deceased, require you to commence suit, within sixty days from the receipt of this notice, to enforce the alleged lien filed by you on the —— day of ——, 18—, to secure your alleged claim of \$——, upon the following described premises: [*Here describe the property upon which the lien has been taken.*]

C—— D——,

Executor [or, administrator] as aforesaid.

——, 18—.

—O—

165.

Notice of intention to dispute claim, given to executor or administrator.

(Page 228.)

To C—— D——, Executor of A. B., deceased :

You are hereby notified that I intend to dispute the account of H. C., amounting to \$——, furnished to you by said H. C., for the purpose of making subsequent payments due me from you a security for the payment of said amount, and of which account you furnished me a copy on the —— day of ——, 18—.

—O—

166.

Cancellation of mechanic's lien, to be indorsed on the lien.

(Page 226.)

I certify that the within lien has been fully satisfied, and that it may
be canceled of record. C—— D——,

Executor [or, administrator] of A B., deceased.

— C —

167.

Return on summons, and verification thereof, when served by plaintiff or other person.—To be endorsed on the summons.

(Page 135.)

Received the within summons, —, 18—, and served the same on
E. F., I. K., and S. T., on the — day of —, 18—; (*etc., specifying
the persons served and the date of service on each*) by delivering to each of
them personally a true copy thereof. C—— D——.

The State of Ohio, — county, ss.

C. D., being sworn, says that the foregoing return, and each state-
ment therein, is true, as he verily believes. C—— D——.

Sworn to before me and signed in my presence, this — day of —
18—. H—— M——,

Probate judge (or other officer, as may be)

ANNUITY TABLE.

*Showing the Value of an Annuity on a Single Life, according to the
CARLISLE Tables of Mortality.*

EXPLANATION OF THE TABLE.

To find the value of a widow's dower by the following table, first compute the interest for one year, at six per cent., upon one-third the value of the entire property subject to dower, and multiply the amount thus ascertained, by the amount set opposite the widow's age, in the six per cent. column of the tables. Example: Suppose a widow aged sixty years is entitled to dower in real estate that sells for \$3,000.00. The interest on one-third of this sum, for one year, is \$60.00. Opposite the widow's age, in the six per cent. column, is 8.304. Multiply \$60.00 by 8.304, and the result will be \$498.24—the present value of the dower

Age.	4 pr cent.	5 pr cent.	6 pr cent.	7 pr cent.	8 pr cent.	9 pr cent.	10 pr cent.
1	16.555	13.995	12.079	10.605	9.439	8.502	7.732
2	17.726	14.983	12.926	11.342	10.088	9.080	8.251
3	18.715	15.824	13.653	11.978	10.651	9.584	8.705
4	19.231	16.271	14.043	12.322	10.957	9.858	8.954
5	19.592	16.590	14.326	12.574	11.184	10.064	9.141
6	19.745	16.735	14.460	12.698	11.298	10.168	9.237
7	19.790	16.790	14.519	12.756	11.354	10.221	9.287
8	19.764	16.786	14.527	12.770	11.371	10.240	9.306
9	19.691	16.742	14.500	12.754	11.362	10.236	9.304
10	19.583	16.669	14.449	12.717	11.334	10.214	9.286
11	19.458	16.581	14.385	12.669	11.296	10.183	9.267
12	19.335	16.495	14.322	12.621	11.259	10.153	9.238
13	19.209	16.406	14.257	12.572	11.221	10.123	9.213
14	19.082	16.317	14.191	12.522	11.182	10.091	9.187
15	18.955	16.228	14.126	12.473	11.144	10.061	9.161
16	18.836	16.145	14.067	12.429	11.111	10.034	9.140
17	18.722	16.067	14.011	12.389	11.081	10.011	9.122
18	18.607	15.988	13.956	12.348	11.051	9.988	9.104
19	18.487	15.905	13.897	12.305	11.019	9.963	9.085
20	18.362	15.818	13.835	12.259	10.985	9.937	9.064
21	18.232	15.727	13.769	12.210	10.948	9.909	9.041
22	18.094	15.629	13.697	12.156	10.906	9.876	9.015
23	17.950	15.526	13.621	12.098	10.861	9.841	8.987
24	17.801	15.418	13.541	12.037	10.813	9.802	8.955
25	17.645	15.304	13.456	11.972	10.762	9.761	8.921
26	17.486	15.188	13.369	11.904	10.709	9.718	8.886

ANNUITY TABLE—*Continued.*

Age.	4 pr cent.	5 pr cent.	6 pr cent.	7 pr cent.	8 pr cent.	9 pr cent.	10 pr cent.
27	17.320	15.065	13.276	11.832	10.652	9.671	8.847
28	17.154	14.943	13.183	11.759	10.594	9.624	8.808
29	16.997	14.827	13.096	11.693	10.542	9.582	8.773
30	16.852	14.723	13.020	11.636	10.498	9.548	8.747
31	16.705	14.617	12.942	11.578	10.454	9.514	8.719
32	16.553	14.506	12.860	11.516	10.407	9.476	8.690
33	16.391	14.387	12.771	11.448	10.355	9.435	8.657
34	16.219	14.260	12.675	11.374	10.297	9.389	8.619
35	16.041	14.127	12.573	11.295	10.235	9.339	8.578
36	15.856	13.987	12.465	11.211	10.168	9.285	8.534
37	15.666	13.843	12.355	11.124	10.098	9.228	8.488
38	15.471	13.694	12.239	11.034	10.026	9.169	8.439
39	15.272	13.542	12.120	10.939	9.950	9.107	8.388
40	15.074	13.389	12.002	10.845	9.875	9.046	8.337
41	14.883	13.244	11.887	10.757	9.804	8.991	8.292
42	14.695	13.101	11.779	10.671	9.737	8.937	8.249
43	14.505	12.956	11.668	10.585	9.669	8.883	8.206
44	14.309	12.805	11.551	10.494	9.597	8.826	8.160
45	14.105	12.648	11.428	10.397	9.520	8.764	8.111
46	13.889	12.480	11.296	10.292	9.436	8.697	8.056
47	13.662	12.301	11.154	10.178	9.344	8.622	7.995
48	13.419	12.107	10.998	10.052	9.241	8.537	7.925
49	13.153	11.892	10.823	9.908	9.121	8.437	7.840
50	12.869	11.660	10.631	9.749	8.987	8.324	7.744
51	12.566	11.409	10.422	9.573	8.838	8.197	7.634
52	12.258	11.154	10.208	9.392	8.684	8.064	7.519
53	11.945	10.892	9.987	9.205	8.523	7.926	7.399
54	11.627	10.624	9.761	9.011	8.356	7.781	7.272
55	11.300	10.347	9.524	8.807	8.179	7.627	7.137
56	10.966	10.063	9.279	8.595	7.995	7.465	6.994
57	10.626	9.771	9.027	8.375	7.802	7.294	6.843
58	10.287	9.478	8.772	8.153	7.606	7.120	6.687
59	9.963	9.199	8.529	7.940	7.418	6.954	6.539
60	9.663	8.940	8.304	7.743	7.245	6.800	6.402
61	9.398	8.712	8.108	7.572	7.095	6.669	6.285
62	9.137	8.487	7.913	7.403	6.947	6.539	6.171
63	8.872	8.258	7.714	7.229	6.795	6.404	6.052
64	8.593	8.016	7.502	7.042	6.630	6.258	5.922
65	8.307	7.765	7.281	6.847	6.457	6.104	5.784
66	8.010	7.503	7.049	6.641	6.272	5.938	5.635
67	7.700	7.277	6.803	6.421	6.075	5.760	5.474
68	7.380	6.941	6.546	6.189	5.866	5.570	5.301
69	7.049	6.643	6.277	5.945	5.643	5.368	5.115
70	6.709	6.336	5.997	5.690	5.410	5.153	4.918
71	6.358	6.015	5.704	5.420	5.160	4.923	4.704
72	6.025	5.711	5.424	5.162	4.922	4.701	4.498
73	5.725	5.435	5.170	4.927	4.704	4.499	4.309
74	5.458	5.190	4.944	4.719	4.511	4.319	4.142
75	5.239	4.989	4.760	4.549	4.355	4.175	4.008
76	5.024	4.792	4.579	4.382	4.200	4.031	3.874

ANNUITY TABLE—*Concluded.*

Age.	4 pr cent.	5 pr cent.	6 pr cent.	7 pr cent.	8 pr cent.	9 pr cent.	10 pr cent.
77	4.825	4.609	4.410	4.227	4.056	3.898	3.751
78	4.622	4.422	4.238	4.067	3.908	3.760	3.623
79	4.393	4.210	4.040	3.883	3.736	3.599	3.471
80	4.183	4.015	3.858	3.713	3.577	3.450	3.331
81	3.953	3.799	3.656	3.523	3.398	3.282	3.172
82	3.746	3.606	3.474	3.352	3.237	3.130	3.029
83	3.534	3.406	3.286	3.174	3.069	2.970	2.877
84	3.329	3.211	3.102	2.999	2.903	2.813	2.728
85	2.115	3.009	2.909	2.815	2.727	2.644	2.567
86	2.928	2.830	2.739	2.652	2.571	2.495	2.423
87	2.776	2.685	2.599	2.519	2.443	2.372	2.304
88	2.683	2.597	2.515	2.439	2.366	2.299	2.234
89	2.577	2.495	2.417	2.344	2.276	2.211	2.150
90	2.416	2.339	2.266	2.198	2.133	2.072	2.015
91	2.398	2.321	2.248	2.180	2.115	2.054	1.997
92	2.492	2.412	2.337	2.266	2.193	2.135	2.075
93	2.600	2.518	2.440	2.367	2.297	2.232	2.170
94	2.650	2.569	2.492	2.419	2.350	2.284	2.221
95	2.674	2.596	2.522	2.451	2.383	2.319	2.258
96	2.628	2.555	2.486	2.420	2.358	2.298	2.239
97	2.492	2.428	2.368	2.309	2.253	2.199	2.150
98	2.332	2.278	2.227	2.177	2.129	2.083	2.039
99	2.087	2.045	2.004	1.964	1.926	1.889	1.856
100	1.653	1.624	1.596	1.569	1.543	1.517	1.493

DEFINITION OF TERMS.

A *codicil* is defined by Blackstone to be "A supplement to a will, or an addition made by the testator, and annexed to, and to be taken as a part of a testament, being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator."

A *nuncupative* will is an unwritten, or verbal will.

A *legacy* is a gift or bequest of goods or money by will; and a *legatee* is one to whom such bequest is made.

A *devise* is a gift of real estate by will: the person who gives is called the *devisor*, and he or she who receives, the *devisee*. An *executory devise* of lands is such a disposition of them by will that no estate vests upon the death of the devisor, but only upon some future contingency.

A *testator* is one by whom a will is made.

A *testatrix* is a *female testator*.

A person who at his death leaves a valid will is said to die *testate*, and one who dies without having made a will, *intestate*.

A *residuary legatee* is one to whom the remainder of a testator's estate is given after the payment of his debts, legacies, etc.

A will is said to be *admitted to probate* when it is established by the testimony of the subscribing witnesses; and *admitted to record*, when a copy of such will, with a copy of the order of court admitting the same to probate, is recorded in a state or county other than the one in which it was admitted to probate.

An *executor* is one appointed by a testator to carry into effect his will and settle his estate. An *executrix* is a *female executor*. An *administrator* is one who settles the estate of a deceased person who dies without having made a will. An *administrator with the will annexed* is one appointed to settle the estate of one who has made a will, but named no executor therein, or, having named an executor, he declines to serve. An *administrator de bonis non*

is one who is appointed to settle an estate which has been previously settled in part by an executor or administrator. An *administratrix* is a *female administrator*.

The certificate of appointment which an executor receives from the court is called his *letters testamentary*; and the certificate received by an administrator, his *letters of administration*.

A *chose in action* is a *thing* in action, or the right which a man has in any particular instance to bring suit to recover money or property to which he is entitled.

A *tenant by the curtesy* is a man who holds a life estate in lands by right of his wife, as *dower* is the life estate of a woman in one-third of the real estate of which her husband was seized during marriage.

Lands, tenements, and hereditaments mean simply *real estate*, or that which savors of the realty.

A *fee simple* is an estate without limitation or condition, and which a man holds "to him and his heirs forever: generally, absolutely, and simply."

A *fee tail* is an estate given by deed or will to a person, and to the heirs of his or her body, without the power of disposing of the same.

A *contingent remainder* is where an estate in *remainder* (that is, an estate limited to take effect after another estate in the same property is determined) is made to depend upon the happening of an uncertain event.

An *equitable estate* is where one has an interest in real estate, but has not the legal title.

The law provides that "the term 'will' shall be construed to include codicils as well as wills; every word importing the masculine gender may extend and be applied to females as well as males; every word importing the singular number only may extend to and be applied to several persons or things as well as one; and every word importing the plural number only may extend to and be applied to one person or thing as well as several."^a

(a) § 5913.

APPENDIX.

[ADDITIONAL NOTES.]

ADVANCEMENT. (See 55-58, post.)

BOND, AND SUITS THEREON—

1. In an action against an executor to recover for goods sold to the testator, the defense was that the testator's wife owned a stock of goods, and carried on business on her own account, and that the goods in controversy were sold to her on her sole credit: *Held*, That it was not competent for the executor, as against the plaintiff to prove that the widow took what was left of the stock at the death of the testator, and appropriated the same to her own use. *Johnson v. Hawkins*, 31 Ohio St. 137.

BOOK ACCOUNT—

2. A credit upon an account after the cause of action on the same is barred by the statute of limitations, will not be treated as part payment thereof, unless shown to have been so intended by the parties. *Kaufman, Adm'r, v. Broughton*, 31 Ohio St. 424.

See *Watts v. Shewell*, 31 Ohio St. 334.

COURTESY—

3. A husband, surviving his wife, has a vested estate by courtesy in the separate property of his wife, of which she died seized. *Hall v. Hall*, 32 Ohio St. 184.

4. Where it appears that a deceased wife, at the time of her death, owned land in her own right, and no state of facts then existed that would bar the surviving husband's right to the courtesy therein, and the land is in the possession of another, the surviving husband has a right of action to recover the possession thereof. *Ib.*

See also 52, 53, post.

DAMAGES—DEATH BY WRONGFUL ACT—

5. It is not only the right of the conductor to expel from a train a drunken, unruly, boisterous passenger, but when such a person endangers by his acts the lives of people, it is the duty of such conductor to remove such passenger in order to protect others from violence and danger. But this right must be reasonably exercised, and not so as to inflict wanton or unnecessary

DAMAGES, ETC.—*Continued.*

injury upon the offending passenger, nor so as to needlessly place him in circumstances of unusual peril. If, having exercised reasonable prudence, considering the time, place, and circumstances, as also the condition of the drunken man himself, the conductor expels such passenger, who is afterward run over and killed by another train, not in fault, the expulsion itself is not such proximate cause of the death as will make the company liable. *Railway Co. v. Valleley*, 32 Ohio St. 345.

6. Where a railroad company, engaged in ballasting its road, employed a hand to assist in loading and unloading a gravel train, and in the execution of this service it was necessary for him to ride on the train from the gravel pit to the place of unloading—the train being run under the direction of a conductor, and said hand having nothing to do with its management: *Held*, That such hand, while riding on the train, was a mere employe, and did not assume the character of a passenger; that he and the engineer of the train were engaged in a common service, and that, as he was not under the control or subject to the orders of the engineer, the railroad company can not be held liable for negligence of the engineer, resulting in his death, if it was not guilty of negligence in selecting the engineer. *Kumler v. Railroad Co.*, 33 Ohio St. 150.

7. The employe of a railroad company takes the ordinary hazards of the service, also such risks as arise from his own negligence, or that of such of his fellow employes, engaged in a common service with him, as have no authority or control over him; but takes no risks arising from the negligence of the company, or of a fellow-servant placed by the company in authority over him. *Railway Co. v. Knittel*, 33 Ohio St. 468.

8. If, however, such employe, with a full knowledge of an habitual and continued negligence of the company or his superior fellow-employe in some particular matter, acquiesces therein and continues in the service of the company, without any objection or effort toward a correction of the neglect, he thereby waives his right against the company and takes the risk upon himself. 1b.

9. Where it was the custom of such employes operating a railroad train to switch cars from the main track to a sidetrack while the train is running, and to make such switches on the order of the conductor, without his personal supervision, as required by a rule of the company: *Held*, That an employe, who accepted service on the train subordinate to the conductor, with full knowledge of such custom, or continued in the service after acquiring such knowledge, without any objection, and acquiesced in the custom, waives all right he might have against the company arising from such mode of doing the business, or from the neglect of the conductor in not personally superintending it, as required by the rule of the company; and if he be injured in making such customary switch through his own neglect

DAMAGES, ETC.—*Continued.*

or that of a fellow employe on the train having no control over him, no recovery therefor can be had against the company. *Ib.*

10. A master, whether an individual or a corporation, is responsible to his servants for his own negligence; but, as a general rule, not for that of their fellow-servants. *Railway Co. v. Lewis*, 33 Ohio St. 196.

11. Where, however, a master places one servant in a position of subordination to another servant, and the subordinate servant, without fault, is injured through the negligence of the superior servant, while both are acting in the common service, the master is liable therefor. *Ib.*

12. Whether or not one servant is placed by a common master under the control of another servant, thereby creating the relation of superior and subordinate between them, must be determined from the evidence in each particular case. *Ib.*

13. Where an engineer and brakeman were employed by a railroad company in operating the same train, and there was no evidence to prove that the brakeman was placed in a position of subordination to the engineer, other than what may be implied from the rules of the company, requiring the engineer to give certain specified signals, as "a notice" to apply or loose the brakes, and requiring the brakeman to manage the brakes "according to circumstances and the signals of the engineman," and placing the brakeman, while on the train, in subordination to the conductor: *Held*, That the engineer and brakeman were servants of the company, engaged in a common service; that the relation of superior and subordinate did not exist between them; and that, therefore, the company was not responsible to the brakeman for an injury occasioned by the negligence of the engineer. *Ib.*

14. Where, in an action brought in this state against a master by a servant, for an injury sustained in another state, through the negligence of a superior servant, while engaged in the same service, and the answer merely stated that, by the law of that state, a servant has no action against the master for the negligence of a fellow servant: *Held*, That the answer fails to meet the case, in not stating what the law of that state was, when the negligence complained of is that of a superior servant, and that a demurrer to the answer may, for that reason, be sustained. *Ib.*

15. If an employe enters into or remains in the service of a railroad company, with a knowledge of its rules and regulations, he must be held as undertaking to acquiesce therein; and if he is afterward injured, by reason of his violation of such rules and regulations, he can not claim that their reasonableness is a question to be decided by a jury, in an action by him to recover damages for the injury thus occasioned. *Wolsey v. Railroad Co.*, 33 Ohio St. 227.

16. If the employe has suffered an injury, brought about by a violation

DAMAGES, ETC.—*Continued.*

of the plain instructions of his principal, he can not hold his principal liable therefor. *Ib.*

As to presumption of death, see note §25-28, next page.

DOWER—

17. The power given to an assignee in insolvency, by the 5th section of the act (S. & C. 395) regulating the mode of administering assignments in trust for the benefit of creditors, to sell and convey the real estate assigned, does not enable such assignee to extinguish, by sale, the inchoate right of dower of the wife of the assignor in the assigned property. *Dwyer v. Garlough*, 31 Ohio St. 157.

18. Where, in a suit brought to enforce a vendor's lien for purchase-money, to which the vendee and his wife, and also the holder of a subsequent mortgage executed by the vendee alone, are made defendants, and the proceeds of sale of the land covered by the liens are more than sufficient to discharge the vendor's claim, the wife is entitled, as against such mortgagee, to assert her contingent right of dower in the surplus fund. *Unger v. Leiter*, 32 Ohio St. 210.

19. But such right of the wife must be protected in a mode which will not interfere with the right of the mortgagee to subject the whole estate of the husband in the premises to the present satisfaction of the mortgage debt in its order of priority. *Ib.*

20. Therefore, when such surplus is insufficient to discharge fully the mortgage debt, the court should not (against the will of the mortgagee) direct one-third of the surplus fund to be put on interest by the sheriff, during the life of the wife, for the purpose of securing her contingent dower interest. *Ib.*

21. The proper course, in such a case, is to award to the wife, from the surplus fund, the value of her contingent right of dower therein, to be ascertained by reference to the tables of recognized authority on that subject, in connection with the state of health, and constitutional vigor of the wife and her husband. *Ib.*

22. A release of the wife's inchoate right of dower is a valid consideration for a conveyance of property to her. *Singree v. Welch*, 32 Ohio St. 320.

23. Such conveyance will not be held fraudulent and void as to the husband's creditors, unless the amount of consideration received is so disproportioned to the value of the wife's contingent dower, as to be unreasonable. *Ib.*

24. So great is the difficulty of estimating the worth of contingent dower rights—so uncertain and imaginary are the values which are the necessary elements of the computation—that the court will not pronounce the transaction fraudulent, from the fact that the wife insisted upon and received a

DOWER—Continued.

sum greater than her dower, if the facts do not show *mala fides* in her or her husband. Ib.

25. If a husband leaves his family and usual place of residence, and goes to parts unknown, or a distant state, and is not heard from for a period of seven years, a presumption arises that he is dead. *Rosenthal v. Mayhugh*, 33 Ohio St. 155.

26. Where such presumption exists, and where the husband has abandoned his wife and minor children, without other means of support than the house and lot on which he resided before such abandonment, she may act and contract as a *feme sole*. Ib.

27. If, in fact, the husband is not dead, yet, in such case, she is capable of binding herself, by way of equitable estoppel, by her acts and contracts, as fully as if she were a *feme sole*. Ib.

28. And if she join with the children who have come of age, in order to induce a sale of said real estate for their mutual benefit, in representing that he is dead, and thereby, and for value received, effects a sale of such real estate, and also joins them, as widow, in a conveyance in fee, with covenants of general warranty, and the contract is fully executed by the purchaser: *Held*, That, although the husband be living, and although such conveyance does not operate as a release of her inchoate right of dower, yet she is barred, by way of equitable estoppel, from treating her contract as a nullity, and from asserting her right to have dower assigned, upon the actual death of her husband. Ib.

29. It is not necessary, to constitute such equitable estoppel, that a party should design to mislead; it is enough if the act or declaration was calculated to, and did in fact, mislead another, who acted in good faith and with reasonable diligence. Ib.

30. In a suit for dower, while the amended section 313 of the civil code, passed April 13, 1874 (71 Ohio L. 68), was in force, the heir of the deceased husband was a competent witness for the defense, where the title of the deceased husband was in issue. *Black v. Hoyt*, 33 Ohio St. 203.

31. Whether he would have been a competent witness under said section, as it was in force prior to the passage or subsequent to the repeal of said amended section, *quære?* Ib.

32. The delivery of a deed by the grantor to the officer taking the acknowledgment, with unqualified instructions to deliver it to the grantee whenever he calls for it, followed by an acceptance of the title to the land conveyed, operates to invest the grantee with the title to the land, although, for convenience merely, the grantee permits the officer to retain possession of the deed. Ib.

33. If, after such absolute delivery to the officer, and acceptance by the grantee, but before he takes actual possession of the deed, the grantor mar-

DOWER—Continued.

ries, his wife is not vested with an inchoate right of dower in the premises, and, on her surviving her husband, she is not entitled to dower therein. *Ib.*

See also note 97.

ELECTION—

34. Where a widow elects not to take under the will of her deceased husband, she can take nothing in virtue of the bequests made to her by the will, in lieu of dower. *Jones v. Lloyd*, 33 Ohio St. 572.

35. Where dower is barred by a legal jointure, an election, under section 43 of the wills act, is not necessary to entitle the widow to take the provisions made for her in her husband's will; but where the bar is by an equitable jointure or settlement merely, *'quare?* *Bowen v. Bowen*, 34 Ohio St. 164.

36. The year within which the election under said section must be made begins to run from the date of the service of a citation; and where the widow, appearing in open court, without service of a citation, declines to make her election, she does not thereby waive the issuing and service of a citation, or estop herself from denying that a citation had been issued and served. *Ib.*

37. Whether a widow can take the provisions made for her in the will of her husband, and also claim under an antenuptial contract, whereby her right of dower is barred, depends on the intention of the testator. *Ib.*

38. Where, by antenuptial settlement, a sum of money is secured to the wife, to be paid after the husband's death, and, by a subsequent will, the husband directs all his just debts of every kind to be first paid, and makes provision for the support of his wife during widowhood, with a declaration that the intent and meaning of the testator was to give to his wife the provision made for her in his will, she may claim the provision in the will, and also that made for her in the settlement. *Ib.*

See also 88, 89, 97, post.

EXECUTORS AND ADMINISTRATORS—

39. It is a well settled rule in equity, that a trustee is not permitted to so manage the subject of his trust as to make profits or gain therefrom for himself. The beneficiaries in the trust have a right to expect and require the exercise of his best judgment, care, and diligence on their behalf, and the gains resulting therefrom inure to their sole benefit. *Cox v. John*, 32 Ohio St. 532.

40. What such trustee may not do directly, he is not permitted to do through the intervention of an agent or attorney. *Ib.*

41. An administrator can not, therefore, be allowed, directly, or through his attorney, to compromise, adjust, and settle claims against the estate for which he is acting, for less than their face, and to put the difference in his own pocket. *Ib.*

EXECUTORS AND ADMINISTRATORS—Continued.

42. And the rule is the same, whether the attorney, through whom such compromise and settlement is effected, acts for the administrator officially or personally; and whether he acts, in making such settlement, as the attorney of the administrator, solely, or for him and others, with a view to their joint profit. What the administrator may not do singly, the policy of the law will not permit him to participate in doing. In either case the discounts obtained from creditors must inure to the benefit of the estate. *Ib.*

43. Upon final settlement of the administrator's accounts, it is not the duty of the probate judge to provide for the payment of claims against the estate which no creditor is asserting. *Ib.*

44. Nor is it within the jurisdiction of the probate court, upon such final settlement, to determine the state of accounts between the administrator and the several distributees to whom any balance found in his hand may be payable. The court can only order distribution of such balance according to law, leaving the state of accounts between the parties to be inquired into when such order of distribution is sought to be enforced by the respective distributees. *Ib.*

45. Under section 169 of the administration act (1 S. & C. 599), the filing of exceptions to an account of an executor or administrator in the settlement of an estate, raises a matter of dispute between the exceptor and such executor or administrator as to the items of said account excepted. *Stayner's case*, 33 Ohio St. 481.

46. When such matter in dispute has been duly heard and determined by the court, it can not again be called in question by either of the same parties on the hearing of a subsequent account, without leave of the court. *Ib.*

47. Exceptions are filed to items of a partial account, which are heard and determined by the probate court. On appeal to the common pleas, the matter in dispute is again fully heard and determined: *Held*, That the hearing and determination of the matters involved in the exceptions by the common pleas is final and conclusive in the probate court between the same parties, on the hearing of all subsequent accounts. In such case, the probate court has no power to open up or disregard the order or judgment of the court of common pleas in the settlement of the disputed items in the former account. *Ib.*

48. The provision of said section 169, which authorizes the opening up of all former accounts for the correction of errors or mistakes therein, upon the filing of subsequent accounts, does not authorize the probate court to open up or vacate, at the instance of either of the parties thereto, a former order by the court of common pleas on appeal, in the settlement of a former account. *Ib.*

49. Where the matter had been heard and determined by the common

EXECUTORS AND ADMINISTRATORS—*Continued.*

pleas on appeal from the settlement of a partial account, that court will not, on the hearing of another appeal on a subsequent account, on the motion of either of the same parties, reopen the former adjudication for the purpose of a hearing of the exceptions to the partial account, upon the same evidence, or upon evidence that might have been adduced on the former trial. *Ib.*

50. While the court of common pleas has power, for good cause, on the hearing of a subsequent account, which comes before it by appeal, to open up the settlement of a former partial account, made before the filing of such subsequent account, yet it is not error for it to refuse to do so, where the only cause assigned for such rehearing is, to enable a party to have a new hearing upon the same facts that existed, and might have been adduced at the former hearing. *Ib.*

51. A testator directed his executor, by his will, to sell his real estate, and, after having set aside a specified sum for the support of his widow, to divide the remainder of the proceeds of the sale among his eight children. After the testator's death, and before the executor sold said real estate, G., a son of the testator, mortgaged his interest therein, to secure the payment of a loan of money: *Held*, That such mortgage operated as an equitable assignment to the mortgagee, of the interest of G. in the proceeds of the sale of said real estate by the executor. *Horst v. Dague*, 34 Ohio St. 371.

See note 72; 36 O. S. 181; *Ib.* 454; 37 O. S. 282, 532.

WIDOW—

52. A wife, living separate and apart from her husband, brought an action for alimony, and obtained a decree requiring her husband to pay her a definite sum semi-annually, during her life. The payment of this sum, the husband secured, and then gave the remainder of his property, consisting of a note and a mortgage of the value of \$1,500, to his children, and soon thereafter died. The widow caused letters of administration to be granted, and appraisers to be appointed, who set off and allowed for her year's support the sum of \$800. The administrator brought an action against the mortgagor and said children, to obtain a decree declaring the gifts to the children void, and the application of the fund arising from the mortgage to the payment of said allowance to the widow. The court found that in making the gifts to said children, by the deceased, no fraud was intended, other than what was to be implied from the transaction: *Held*, That the administrator was not entitled to recover. *Lockwood v. Krum*, 34 Ohio St. 1.

53. Where the appraisers of the personal estate of a decedent, first appointed, failed to make to the widow any allowance for her year's support, and the probate court, on her application, appointed new appraisers to make such allowance, the executor and administrator should have notice of the proceedings; but the irregularity of making the order and allowance, with-

WIDOW—*Continued.*

out such notice, should be corrected in the probate court; and where application was made to that court for the purpose, and overruled, and the record does not show that any injustice was done, no ground of reversal is shown. *Heck v. Heck*, 34 Ohio St. 369.

See also 1, 34-38, ante; 88, 94, post.

WILLS—

54. S. devised a portion of his real estate to his son, R., and the remainder thereof to his son, W. He also bequeathed to W. all his personal estate, and charged the devise to W. with the payment of certain legacies to his remaining children; providing that, should W. feel unwilling to accept the provision made for him, and assume and pay the legacies charged, the will should be void, and all said estate administered as if he had died intestate. W. accepted the provision made for him, and assumed the payment of the legacies: *Held*, 1. That the will was valid. 2. That, if it were otherwise, an heir, not in possession, can not maintain a suit in equity to have the will decreed to be void. *Scott v. Kramer*, 31 Ohio St. 295.

55. A testator, at the time of making his will, had five children, three being over age and a daughter and one son being minors. He devised to each of his sons a parcel of real estate. Subsequently, he sold portions of this real estate to two of his sons, taking their notes for the purchase-money. The remainder of his estate, both real and personal, he gave to his executors, in trust, with authority to convert the same into money, and to invest the proceeds in such manner as they might judge most expedient. Provision was made that his two youngest children should be supported and educated from the general income of his estate, until they were twenty-one years of age. He also authorized the two trustees to "pay or loan" to either of his three oldest sons such part of the income or principal of his estate as they might think proper, not exceeding at any time the one-fifth part of his personal estate to either one of them; and, after his two youngest children became twenty-one, he authorized the trustees to "pay or loan to them in like manner;" and, if the trustees thought it expedient, he authorized them to make "such payment or loan" to his daughter, at any time after she attained the age of eighteen years. The will then proceeded as follows: "And whenever said trustees deem it prudent and advisable to do so (after my youngest child living shall have become twenty-one years of age), I hereby authorize them to make a fair and equitable division of all my said real estate and personal property, state and bank stock, bonds, and other evidences of debt, between my said five children or the survivors of them, or their heirs, it being my desire that each of my said children shall have the benefit of as near the same amount of property as convenient when twenty one years of age:" *Held*, That the payments or loans that the trustees were authorized to make to the older children, and to the younger as they became of age, were not intended to bear interest, nor to be refunded, unless it should become necessary in order to equalize the shares of the sev-

WILLS—Continued.

eral children on final distribution. Such payments or loans were intended to be in the nature of advancements, made in anticipation of the final division of the estate. *Harmer v. Sturges*, 31 Ohio St. 657.

56. The desire expressed by the testator, that each of his children shall have the benefit of as near the same amount of his property as convenient, when twenty-one years of age, has reference to the authority, previously conferred on the trustees, of making advancements to the children, and of making the final division among them, and is intended as a guide to the trustees in the execution of such authority. *Ib.*

57. The will contemplates the making of the final division of the property belonging to the estate, among the children, *in specie*; and, in making such final division, each child is not only to be allowed the benefit of the payments or loans made by the trustees under the will, but also the benefit of similar payments, intended as advancements, made by the testator in his lifetime. "The benefit" which it was intended each of his children should have is such as would result from the receipt of his or her share of the property by way of advancement, or on the final division. But the trustees are not allowed to make allowances to the older children, by the way of interest or otherwise, for their not receiving their shares when they became of age, nor for their not having received more on their respective shares than was advanced to them, either by the testator, in his lifetime, or by the trustees after his death. *Ib.*

58. The real estate described in the will as devised to the sons is to be accounted for in the final division of the estate. The portions sold subsequently to the making of the will are to be charged to the sons purchasing the same, according to the terms of the sale; the portions not thus sold are to be charged to the devisees respectively, according to the part received by each at the time the devise took effect. *Ib.*

59. In the construction of a will, it is well settled as a paramount rule, in this state, that the intention of the testator, as gathered from the whole will, must control, when such intention is not in conflict with the law or against public policy. *Carter v. Reddish*, 32 Ohio St. 1.

60. Words in a will are to be understood according to their ordinary, natural, and legal signification, unless it is manifest from the context, or from other provisions in the will, that the testator has used them in a different sense, and unless the sense in which they are used is clearly apparent. *Ib.*

61. Where real estate is devised to A., an infant son of the testator, in general terms, and the devise is followed by a *habendum* "during his natural life, and to his heirs," together with a limitation over to certain nephews and nieces, in case A. shall die within age, and without lawful issue, the word "heirs," in the *habendum*, will be construed as a word of limitation, enlarging the life estate to a defeasible estate in fee simple, if such construction be

WILLS—Continued.

conformable to the general scope of the will, and the apparent scheme of disposition, and consistent with all the other provisions of the will; and where a different construction would leave the fee of the premises undisposed of, in the event of A.'s death, without issue, after becoming of full age. *Ib.*

62. The 47th section of the wills act, of 1840, and the corresponding 53d section of our present wills act, were intended merely to forbid the application of the rule in Shelley's case, where such application would defeat the manifest intention of the testator. *Ib.*

63. A testator, whose estate consisted of a single tract of land, occupied as a homestead, and some personal property, devised and bequeathed to his wife one-half of all his real and personal estate, and the other half to his brothers and sisters, and the children of a deceased sister, naming each, and specifying the proportion or share of each. He appointed an executor, and authorized and empowered him to sell and convey "all said real estate to the purchaser or purchasers thereof, if necessary for the purpose of distributing" it "among the devisees and legatees aforesaid:" *Held*, That this was a devise in fee, to each of the devisees by name, of an undivided estate in land, in the proportions specified, and not a bequest of the proceeds of said land. *Hoyt v. Day*, 32 Ohio St. 101.

64. That the power of sale vested in the executor was a naked power only, not a power coupled with an interest in the land, and could only be exercised, if necessary, for the purpose of making distribution among the devisees. *Ib.*

65. Each of said devisees holds his share as a tenant in common with the others, and is entitled to all the rights of such tenancy, subject only to the power of sale. *Ib.*

66. The power of sale was not absolute. It could only be exercised, if necessary, for the purposes of distributing the estate. Its exercise must be limited to the purposes for which it was granted. *Ib.*

67. A devisee may sell and convey his undivided share as real estate, before distribution, but the purchaser takes the same, subject to this power of sale, the same as his grantor, if its exercise becomes necessary. *Ib.*

68. The devisees, or their grantees, have each the right to hold his share in severalty, if the same can be set off without manifest injury to the others; but if distribution can not be made in land, and it becomes necessary to sell, to make a proper division, then the executor is authorized to sell the whole, notwithstanding a prior conveyance of an undivided interest by one of the devisees. *Ib.*

69. By proceedings in partition, the widow had her half assigned to her in land: *Held*, That the power of sale was not thereby defeated as to the other half, if the necessity existed for a sale, to make distribution among the other devisees. *Ib.*

70. The defendant acquired title to an undivided share, by purchase of a

WILLS—*Continued.*

devisee. The plaintiffs afterward purchased and received a deed for the whole, including defendant's share, from the executor. The plaintiffs can not maintain their title to the share of defendant, unless the necessity existed for the sale of the whole, and a court of equity will not enjoin proceedings in partition to have such share set off in land, unless it appears that such share can not be set off, without manifest injury to the interests of his co tenants. *Ib.*

71. In construing a will, extrinsic evidence may be received to show the circumstances under which it was made. The testator having used the phrase "my two farms," such evidence may be introduced to show the situation of the land, and the manner in which it had been used and treated, in order to ascertain whether a disconnected piece of woodland was, in fact, a part of one of the "two farms," so as to pass under the devise. *Black v. Hill*, 32 Ohio St. 313.

72. The residuary clause of a will was in these words: "I bequeath to my daughters, Mary Ann and Eliza, and their heirs, all the residue of my estate, real, personal, and mixed, in equal shares; and in case the said Eliza shall decease without lawful heirs of her body, her share to pass to the said Mary Ann Hunter and her heirs." The estate was settled up, leaving a residuum in money, which in pursuance of the will was equally divided between the two daughters who were then living. Mary Ann died, leaving as heirs two children. Afterward, Eliza died without heirs of her body: *Held*, In the absence of any thing in the will to the contrary, it was the duty of the executor, upon the settlement of the estate, to make distribution as therein expressly directed, and such distribution was a proper and complete administration of his trust in relation to such bequest. *Ratcliff v. Warner*, 32 Ohio St. 334.

73. Whether the bequest over, on the death of Eliza without heirs of her body, is void, because inconsistent with the bequest to her and her heirs, or was valid: *Quære?* *Ib.*

74. But if valid, they, and not the personal representative of the testator, are the proper plaintiffs, to assert their rights, after final distribution of such bequest as directed by the will. *Ib.*

75. Where a testator makes no disposition of his real estate, other than by directing that it shall be sold by his executors and the proceeds paid to a trustee named in the will, for the benefit of certain legatees, the legal title to this real estate descends to his heirs, subject to the execution of the power conferred on the executors; but the right of possession passes with the will to the executors, to enable them to effect the objects of the testator. *Elstner v. Fife*, 32 Ohio St. 358.

76. Where such executors, after accepting the trust, resign their office as executors, their authority to execute the power of sale conferred by the will upon them as executors expires with their office. *Ib.*

WILLS—Continued.

77. Under the provisions of section 59 of the wills act of March 23, 1840, as amended March 8, 1845, where a will directs land to be sold by the executors, and they resign without having executed the power, the sale or conveyance, or both, may be made by an administrator with the will annexed. Ib.

78. Where an administrator with the will annexed, in the execution of such power, sells land and gives the purchaser a title bond and possession of the premises, the purchaser acquires thereby an equitable right, on payment of the purchase-price, to a conveyance of the land; but such purchaser has no right to demand a conveyance, until the purchase-money is paid. Ib.

79. Where such administrator resigns his office, and wholly abandons the administration of the estate, his authority under the statute to execute such power conferred by the will ceases; and a deed, made by him afterward, of land sold to him while in office, and before the purchaser is entitled to a deed, conveys no title to the land. Ib.

80. Where neither party has the legal title, the rule which protects a *bona fide* purchaser without notice does not apply; and where, in such case, the equities are equal, the oldest equity must prevail. Nor is the rule available against one who unites in himself both the legal and equitable titles. Ib.

81. Where a testator directed his land to be sold by his executors, and the proceeds to be paid at a specified time, to certain legatees to whom he bequeathed his whole estate; and, in execution of the power of sale, the land was sold, and possession with a title bond was given to the purchaser, but the purchase-money had not been paid, nor a conveyance of the land made, when the time arrived for the payment of the money to the legatees: *Held*, That the legacies were an equitable charge upon the land, and that the legatees had the right in equity to subject the land to the payment of the purchase-money. Ib.

82. In one clause of his will, a testator bequeaths to M. L., a married woman living with her husband, a specified sum of money. In a subsequent clause, it is provided that if M. L. shall die, leaving no child of her own, then the money shall be equally divided between the testator's living children, the issue of his own body. Upon final settlement of the estate, the executor had funds sufficient to pay all the legacies, but refused to pay M. L., claiming the right to hold the amount during her life, to be placed at interest for her benefit. Assuming that the limitation over to the living children of the testator, in the event that M. L. shall die leaving no child of her own, is valid, and not void as being inconsistent with the first clause: *Held*, 1. That as the bequest over is upon uncertain contingencies that may never happen—namely, the death of M. L., leaving no child of her own, with living children of the testator surviving her—the children of the tes-

WILLS—*Continued.*

tator, if they take at all, do so by way of executory devise, and not as legatees in remainder. 2. M. L. takes the bequest absolutely, and is entitled to the possession thereof. Her estate, if the limitation over is valid, is liable to be divested by the happening of the contingencies named, and no estate or interest vests in the possible legatees over, until such contingencies happen. 3. Upon final settlement of the estate, before the death of M. L., and in the absence of any provision of the will making it the duty of the executor to hold and manage said legacy, she is entitled to receive the same. 4. If such limitation over is valid, the children of the testator, and not the executor, in the absence of a trust reposed in him, are the proper parties to an action or proceeding to protect their contingent interest, if any necessity for such action arises. *Lapham v. Martin*, 33 Ohio St. 99.

83. The controlling principle in the construction of wills is the ascertainment of the intention of the testator; but where the intention remains in doubt, resort must be had to settled rules of construction for aid in the solution of the difficulty. *Linton v. Laycock*, 33 Ohio St. 128.

84. The law favors the vesting of estates, and, in the construction of devises of real estate, the estate will be held to be vested in the devisee at the death of the testator, unless a condition precedent to such vesting is so clearly expressed that the estate can not be regarded as so vested, without directly opposing the terms of the will. To this end, words of seeming condition will, if they can bear that construction, be held to have the effect of postponing the right of possession only, and not the present right to the estate. *Ib.*

85. A devise to one *when* he arrives at a given age—the intermediate estate being devised to another—vests on the death of the testator, and is not defeated by the death of the devisee before the specified age. The words of futurity, importing contingency, are not necessarily inconsistent with the immediate vesting of the estate, but may be regarded as merely postponing the possession. *Ib.*

86. A devise, though not otherwise expressed, is implied in a direction in the will to divide an estate amongst specified devisees; and the rule vesting legacies—bequeathed only by a direction to pay or divide—at the time fixed for the payment or division, does not apply to devises of real estate. *Ib.*

87. Where a testator devised his whole estate to his wife, until his youngest son became of age, “when” it was to be “divided amongst all his children then living, or their heirs,” and he made no other disposition of the remainder during the term of years, nor of the estate, in case his wife declined to take under the will, or died before the time fixed for the division, and it appears that he had no other motive in making the will than the creation of the estate for years for the benefit of his wife and certain other beneficiaries: *Held*, 1. That the disjunctive phrase, “or their heirs,” does not refer to the children living when the youngest arrives at age, but relates

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to such of them as may then be dead. 2. That the word heirs is not used as a word of purchase, creating a new class of beneficiaries, but is used as a word of limitation, so that, in case of the death of a child, his share shall not go to the survivors, but pass as if inherited from the deceased. 3. That the estate vested in the children at the death of the testator, subject to the estate for years, and was not divested by the death of a child during the term, but his share descended to his heirs, who take the same by inheritance, and not as devisees under the will. *Ib.*

88. Where a husband devised real estate to his wife during her life, or while she remains unmarried, under which she takes possession and occupies the land with the knowledge of the heirs at law for a series of years after the time limited in which she may make her election, in the absence of any showing to the contrary she will be presumed to have made her election in fact. *Nimmons v. Westfall*, 33 Ohio St. 213.

89. A testator by his will clearly vested the title to a specific portion of his real estate in his executors in trust, with directions to sell the land and distribute the proceeds equally among his heirs at law, and it was claimed the executors are vested with a like trust and direction in and over other real estate devised: *Held*, That the court, in order to ascertain and carry out the intention of the testator in that respect, will look to the whole will and all its parts. *Ib.*

90. W. devised to his wife, H., and his son, J. H. W., by a distinct and independent clause of his will, the use of certain real estate, during the life of H., or while she remained unmarried, and then provided: "But at the death of my said wife, or if she should intermarry with any person after my decease, it is my will that the said aforementioned and described farm shall be sold, and the proceeds of the same be equally divided between my children or their heirs forever; or that they, my said children, divide said farm to suit themselves as they think best: *Held*, 1. By this devise, standing unaffected by the other provisions of the will, no trust estate is created in the executors. 2. Under this clause H. and J. H. W. take estates for life in the land described therein, determinable on the death or marriage of H., with remainder in fee to the heirs at law of the testator. *Ib.*

91. The act of April 13, 1865, entitled "an act supplemental to the act to authorize the sale or lease of estates tail and estates for life in certain cases," by express provision extends and applies the acts of April 4, 1869, and March 30, 1864, to all estates tail or for life, with remainder over to any other person or persons, and to all determinable estates which may be created by will, etc., after its passage. *Ib.*

92. Under the act of April 4, 1869, and the acts supplementary thereto, the owner of the life estate in possession, created by will subsequent to April 13, 1865, may institute proceedings for the sale of both the life estate and the estate in remainder; and this may be done notwithstanding the tes-

WILLS—Continued.

tator may have made special direction in his will for the disposition of the land on the determination of the life estate. Ib.

93. The act of April 4, 1859 (S. & C. 550), and the supplemental acts of March 30, 1864 (S. & S. 346), and April 23, 1865 (S. & S. 347), in so far as they affect and apply to estates created subsequent to their passage, are not in contravention of section 19, of article 1, of the constitution of this state. Ib.

94. Where a widow elects not to take under the will of her deceased husband, she can take nothing in virtue of the bequests made to her by the will, in lieu of dower. *Jones v. Lloyd*, 33 Ohio St. 572.

95. While a will should be read and construed by the light of the circumstances under which it was executed, yet such circumstances can affect its construction only when it appears that they were known to the testator at the time of its execution. Ib.

96. The term *heirs*, when used in a will, is flexible, and should be so construed as to give effect to the manifest intention of the testator as ascertained by a due consideration of all the provisions of the will. Ib.

97. Where a testator makes a provision for his wife, in lieu of dower, and directs that, in the event of her claiming dower, the balance of certain personal property bequeathed for her support "shall be shared equally among my heirs," the words "*my heirs*" will be construed as meaning *my next of kin*, or, *my heirs according to the statute of distribution, exclusive of my wife*; though his wife, in case of intestacy, would, under the statute, have taken all such personal property. Ib.

98. Hence, where the brothers and sisters of the testator are his *next of kin*, and are recognized as such by the statute of descents and distribution, after the wife, they are to be regarded as the legatees under such will—in case the widow declines to accept its provisions. Ib.

99. Where a will has been signed for the testator by another person, in his presence and by his express direction, in the absence of attesting witnesses, the acknowledgment of the fact by the testator in the hearing of the witnesses, which is requisite, is not required to be made in any particular form of words or any specified manner; but, if by signs, motions, conduct, or attending circumstances the attesting witnesses are given to understand, by the testator, that he acknowledges the signature thereto as his, and the instrument itself as his will, it is sufficient. *Haynes v. Haynes*, 33 Ohio St. 598.

100. It is not necessary, in addition to such acknowledgment, that the testator should further acknowledge to each or both the attesting witnesses, that such signing was done in pursuance of his previous express authority and in his presence by the person signing for him. Ib.

101. The fact of such signing and the authority to sign, when done in the absence of the attesting witnesses, may be shown by the acknowledgment

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to the witnesses, or by other competent testimony, or may be presumed from the facts and circumstances of the case. Ib.

102. The execution of a will can not be assumed in the face of positive evidence to the contrary, or in the absence of all proof on the subject, except, perhaps, in case of ancient wills, merely because it purports to be the will of the testator, and the attestation is in due form; yet it will not be defeated by the failure of memory or corruption of the attesting witnesses, if it can be established by other competent testimony. Ib.

103. The original will, when not lost or destroyed, and not a copy from the record in the probate court, used in the pleadings, should be produced to the jury in proceedings to contest its validity. Such will is the basis of inquiry, and the trial, verdict, and judgment should be responsive to the question, whether that paper be the last will of the testator or not. Ib.

104. Where in such copy a devise of lands reads: "Eighty-six acres off the east side" of a half section owned by the testator, and the original will reads, "west side" instead of "east side," and the jury finds "the paper writing produced" to be the will, and the court adjudges "the paper writing mentioned in the petition" to be such will, the judgment does not follow the verdict, and the whole record leaves it uncertain what is the proper reading of the testator's will. Ib.

105. If, upon the face of the will, it is apparent that it has been altered in a material provision, and evidence is offered tending to show that such alteration was made since its execution, as well as to show that it was made before; it is the duty of the jury, in case the will is established, to determine the question in dispute, and establish the will as it read when executed. Ib.

106. If it appears that such alteration was made before execution, then the paper writing, as it reads after such alteration, is the will; if made after such execution, and such alteration does not invalidate the instrument, such jury should, by special verdict, establish the will as it read before such alteration. Ib.

107. Proceedings to contest the validity of a will under the statute are in the nature of an appeal from the order of probate thereof, and all the material facts in issue, are to be heard and determined *de novo* as though such order of probate had not been made; except that such order of probate is *prima facie* evidence of the due attestation, execution, and validity of the will, and the burden of proof is on the contestants to invalidate it. Ib.

108. A testator devised to his wife, during life or widowhood, all his real estate, accompanied by a bequest of personalty, as follows: "And all my personal property, household goods, and provisions, including moneys and credits of every description, which may be thereon at the time of my decease, during her natural life; she, however, selling so much thereof as may

WILLS—Continued.

be sufficient to pay my just debts." He devised the remainder in said real estate to his three daughters in unequal portions. He bequeathed to one of his daughters \$1,500; to another, \$1,000; to a daughter of a deceased son, \$500, and to her mother, \$5—said legacies to be paid at the death of his widow; and declared that the legacy to the granddaughter, and the one to her mother, together with a tract of land conveyed to the son before his decease, made for them an equitable share of his estate. He also declared that if, "at the death of my said wife, there should be any of my said personal property or money, hereby devised to my said wife and heirs, left unconsumed," it should be divided between his three daughters and their heirs; and concluded as follows: "It is my will that all my money, deposited or otherwise, is to be left on deposit, at interest, during the lifetime of my said wife, except the interest to be drawn and used by her as she may need." He appointed his wife executrix of his will: *Held*, That the bequest of personal property, together with "moneys and credits of every description," to the wife, during life, includes money and United States bonds on deposit in bank; and that what remains unconsumed of the same, at the widow's death, is to be applied to the payment of said legacies, the residue to be equally divided between the testator's three daughters. *Gillen v. Kimball*, 34 Ohio St. 352.

See also 34-38, 51, ante; 35 O. S. 503; 26 O. S. 17.

109. "In all cases, however, in which a trustee places money in the hands of a banker, he should take care to keep it separate, and not mix it with his own in a common account; for, if he should so mix it, he would be deemed to have treated the whole as his own, and he would be held liable to the *cestui que trust* for any loss sustained by the banker's insolvency." 2 Story on Equity Jurisprudence, § 1270. Also, Hill on Trustees, 375, 376; 1 Perry on Trusts, § 344.

110. "But, with respect to losses sustained by the failure of bankers, or other persons into whose hands the money of the testator has been deposited by the executor, the rule, at least in equity, seems to be that where the deposit was made from necessity or conformably to the common usage of mankind, the executor will not be responsible for the loss." 2 Williams on Executors, 1545, 1546.

111. "An executor will not be liable for money allowed to remain with bankers who fail, where it is not an unreasonable sum for the executor to keep in bank, or where it was only reasonable for the money to be deposited there under the circumstances." Smith on Equity, paragraph 355.

112. "An executor may deposit money in a bank, and he will not be responsible upon the bank's failure, if placed to a separate account, and he do not keep it there an unreasonable time; and a year is not too long." (Citing

numerous English and American cases to sustain this.) 1 Perry on Trusts, §§ 343, 344, 346.

113. Trustees and executors have a reasonable time to wind up a testator's estate, and make investments; and they may, without responsibility, keep the money in a reliable bank for one year after the death of the testator; but if they draw the money out of bank, and made any irregular investment, or lend it to another bank on interest, they will be responsible for the loss of the money, even if the will directs that the trustees shall not be responsible for losses by a banker, the construction of such direction being that the trustees shall not be liable for loss of money deposited with a banker in the ordinary manner. (Citing *Johnston v. Newton*, 11 Hare, 160; *Swinfen v. Swinfen*, 29 Beavan, 211; *Wilkes v. Groom*, 3 Dr. 584.) 1 Perry on Trusts, § 346.

114. In *Shaw v. Bauman*, 34 Ohio St. 25 (in which a justice of the peace was held liable for money officially collected by him, and deposited *in his own name* in a bank which failed), the court use this language (p. 32): "The rule in equity is well settled, . . . that if a trustee deposits the funds of a trust estate in bank, in his own name, individually, with his own private funds, he thereby becomes debtor to the trust estate, and a creditor of the bank; and, in case the trust funds are lost through the insolvency of the bank, the trustee becomes individually liable for the loss. (Citing *Wren v. Kirton*, 11 Ves. 377; *Macdonnell v. Harding*, 8 Eng. Ch. 177; *Re Stafford*, 11 Barbour, 353; *Brown v. Recketts*, 4 John. Ch. 303; *Ins. Co. v. Lynch*, 11 Paige, 520; *Phillips v. Lamar*, 27 Geo. 227.)

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